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TAXATION AND THE ALBERTA MATRIMONIAL PROPERTY ACT: THE MEANING OF SPOUSE

University — Université

UNIVERSITY OF ALBERTA

Degree for which thesis was presented — Grade pour lequel cette thèse fut présentée

LL.M.

Year this degree conferred — Année d'obtention de ce grade 1983	Name of Supervisor — Nom du directeur de thèse DEAN FRANK JONES, QC.

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TAXATION AND THE ALBERTA MATRIMONIAL PROPERTY ACT: THE MEANING OF SPOUSE.

by

© Ms. WALLIS KEMPO, Q.C.

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA
Fall, 1983

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

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FOR MY CHILDREN TO SHOW THAT ONE IS NEVER
TOO OLD TO ACHIEVE, AND TO BERNARD WHO
KNEW IT COULD BE DONE

ABSTRACT

It is trite to say that the subjects of taxation, marriage and rights to matrimonial property on marriage breakdown may all be of concern at one time or another to a great majority of individuals resident in Canada who are, or perceive themselves to be, a spouse or former spouse for these purposes.

A statistical report entitled Marriage, Divorce and Morality: A Life Table Analysis for Canada 1975-1977 published by Statistics Canada in May of 1981 at page 10 arrives at the chilling conclusion that:

> ...while in 1971 it was expected that one in four current marriages would end in divorce, by 1976 this number had increased to better than one in three.

As these conclusions are based only on the numbers of divorces granted in Canada they therefore may not reflect the true Canadian statistical picture of marriage breakdown as occurring in all its forms. Also of note is the absence of any statistics pertaining to those spousal-type relationships colloquially known as common law marriages, whether of short or long term duration. It is not unusual to hear of the widely held belief that if a man and a woman live together for, say, five or seven years then somehow their cohabitation, or living common law, is transformed into a marriage. The real legal problems surface when the

relationship has broken down with the normal and inevitable concerns respecting property entitlements and taxation consequences relevant thereto.

The advent of statutory reform expressed by the Alberta Matrimonial Property Act and key amendments to the exempting provisions of the Canada Income Tax Act all pertain to a spouse or former spouse which, by definition, are prescribed to include void and voidable marriages.

Does the statutory use in both enactments of the word "spouse" or "former spouse" also include cohabitation or common law relationships? What do they mean and are the meanings integrated between the two statutes? These are the major questions to be addressed which is the task of this thesis.

ACKNOWLEDGMENTS

To my supervisor, Frank Jones, Q.C., Dean of the Faculty of Law, I am greatly indebted as this thesis may never have been completed without his encouragement, assistance and unfailing patience.

In the same vein I am also greatly obliged to and wish to thank the Law Professors, David P. Jones, Peter Lown, Christine Davies, Leonard J. Pollock, Ellen Picard and Dr. S.P. Khetarpal whose doors and minds were always open to me, day or night, during my times of confusion and dismay. Their learned advice and guidance was invaluable. I would also like to acknowledge the timely assistance rendered to me by Professor Lewis Klar when it was needed.

I must also express my utmost gratitude to the acting Director of the Institute of Law Research and Reform, George Field, Q.C. for allowing me the use of their excellent and convenient facilities. Included in my gratitude are members of the Institute staff Doris Dobbin, Thora Munro and Carole Worock for their care and skill in the typing of this thesis. The efficient, cheerful and obliging attitudes that they brought to this task gave me a greater incentive to keep going.

In addition I would like to thank the members of the library staff for their unfailing assistance and courtesy.

Finally, I must thank my entire family for their enduring love, support and encouragement while bearing patiently and without complaint my long and frequent absences from home.

Table of Contents

PART I: THE STATUTORY APPROACH 3

1. The problem outlined 3
2. Interpretative Guidelines 5
   - A. Introduction 5
   - B. The Rules of Statutory Interpretation 7
     - (a) The General Rules 7
       - (i) Aids to Construction 10
       - (ii) Presumptions Affecting Interpretation 10
     - (b) Special Rules Applicable to Taxation Statutes 12
3. Summation 14

PART II: THE ORDINARY AND PLAIN MEANING 17

1. The Meaning of "Spouse" 17
   - A. Introduction 17
   - B. The Dictionary Meaning 17
   - C. "Marriage": Meaning and Nature 19
     - (a) Introduction 19
     - (b) The "Common Law Marriage" 22
       - (i) Introduction 22
       - (ii) The English Historical Aspect 24
       - (iii) The Canadian Current Aspect 30
     - (c) The Presumption of Marriage 37
     - (d) Void and Voidable Marriage 39

(e) Polygamous and Potentially Polygamous Marriage 41
(i) Definition and Matters Affecting Validity 42
(ii) Jurisdiction of the Courts 43
(iii) Effects of a Polygamous Marriage 45
(iv) Summation 45
(f) Cohabitation without marriage 46
(g) Judicial Separation 47
D. Summation 48
2. The Meaning of "Former Spouse" 51
A. Introduction 51
B. After Termination of Marriage by Divorce 52
C. After Annulment of a Void or Voidable Marriage 54
(a) The Void Marriage 54
(b) The Voidable Marriage 54
D. Judicial Separation 54
E. Summation 55
PART III THE INCOME TAX ACT 57
1. Introduction 57
2. The Act as a Whole 60
3. Subsections 73(1) and 73(1.2) 62
A. Contextual Analysis 62
B. The meaning of "void marriage" 65

C. "In Settlement of Rights Arising out of Marriage" 67

4. Other Tax Implications 67

5. Bill C-139 and the Proposed Amendments 74

A. Subsection 160(1) 74

B. Subsection 73(1.2) 75

6. The Doctrine of Strict Construction 79

A. Introduction 79

B. The Tax Cases 80

(a) Cohabitation 80

(b) The Voidable Marriage 83

(c) The Void Marriage 85

7. The Polygamous Marriage and the Plurality of Spouses 89

8. Judicial Separation 95

9. The Spouse as Survivor 96

A. The General Rule 96

B. The Exempting Rules 96

C. The Voidable Marriage that has been Annulled 102

D. The Polygamous Marriage 103

PART IV THE ALBERTA MATRIMONIAL PROPERTY ACT 105

1. Introduction 105

2. Subsection 1(e) 106

3. The Context of the Act 108

A. Cohabitation 108

B. The "Former Spouse" to an Annulled Marriage 109
4. Section 2 and the Void Marriage 110
5. The Time Limitations 112
6. The Polygamous Marriage 114
7. The Spouse as Survivor 122
A. Introduction 122
B. The Surviving Spouse 124
C. The Surviving Former Spouse 125
D. The Deceased's Estate 125
PART V SUMMARY AND CONCLUSIONS 127
BIBLIOGRAPHY 134
APPENDIX I TABLE OF CASES 142
APPENDIX II STATUTES CITED 147

INTRODUCTION

This thesis will be devoted to an analytical study of the meaning of the terms "spouse" and "former spouse" as used in the Income Tax Act (Canada) and the Alberta Matrimonial Property Act in order to determine if their meaning is integrated for the purposes of these two enactments, where applicable.

Part I will outline the problem and will present the rules of statutory interpretation as they may apply not only generally but also as they may apply specifically to taxation statutes.

Part II will be an analysis of the ordinary and plain meaning of the words which are the subject of this thesis. Also included will be an analysis of the meaning of such terms as marriage, common law marriage, void and voidable marriage, polygamous and potentially polygamous marriage and cohabitation as each such relationship forms an essential sub-strata to any relationship that is spousal in nature.

Part III will outline those provisions of the Income Tax Act and fiscal jurisprudence which are of relevance to the problems outlined in this thesis. Relevant ancilliary tax implications will also be highlighted.

Part IV will similarly outline those provisions of the Alberta Matrimonial Property Act and common law jurisprudence which are of relevance.

Finally, in Chapter Five, a summary of examples of non or doubtful integration of the interplay between the two enactments will be noted, and certain recommendations for reform will be advanced.

PART I THE STATUTORY APPROACH

1. The Problem Outlined

The need for an analysis of the meaning and nature of the marital relationships contemplated within the provisions of the Canada Income Tax Act[1] and the Alberta Matrimonial Property Act[2] arises out of the failure of each enactment to prescribe, in definitive and exhaustive terms, a definition beyond that which is currently expressed as spousal in nature.

For the purposes of subsection 73(1) of the Income Tax Act, "'spouse' and 'former spouse' includes a party to a void or voidable marriage, as the case may be".[3] For the purposes of the Alberta Matrimonial Property Act "'spouse' includes a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable".[4]

While it is obvious that they are almost identical as to the marital relationships that are to be included, neither addresses itself to the underlying question as to the meaning of spouse or former spouse for its purposes.

---

[1] 1970-71-72 (Can.), c. 63.

[2] 1980 R.S.A. c. M-9.

[3] The Income Tax Act, supra n. 1 currently subsection 73(1.2).

[4] The Matrimonial Property Act, supra n. 2 subsection 1(e).

As an including definition is not generally regarded as exhaustive but rather as an extension or enlargement of the main word or words,[5] the ordinary meaning of a spousal relationship is not thereby necessarily restricted or confined to one that has, or has had, some kind of marriage[6] as its basis. In other words, an extension of the meaning of spouse and former spouse would not take away its own ordinary, popular and natural sense but rather adds to it those relationships that, but for the extended provisions, may not otherwise be included.

If the meaning of the words "spouse" and "former spouse" could be said to be clear and unambiguous then no further analysis of their meaning would be necessary, for that clear meaning must be taken as legislative intention when it enacted the legislation.[7] The tax courts have held that there is no ambiguity to the meaning of the word "spouse" when used conjunctively with the words "married person".[8]

---

[5] Maxwell on the Interpretation of Statutes (12th ed. 1969) at 270, Craies on Statute Law (7th ed. 1971) at 214.

[6] For example a void marriage is not a marriage *de jure* but is at best merely an attempt to marry or a *de facto* marriage.

[7] Maxwell, *supra* n. 5 at 1, Craies, *supra* n. 5 at 64-65.

[8] The tax decisions are cited and discussed in Part III

However an observation in a recent civil case that "'spouse' may be a more accurate term" to apply to a common law relationship of unmarried persons[9] may be taken as only one example that the meaning of "spouse", in and of itself, may not necessarily be clear and free of ambiguity. If this is the case then the meaning of "former spouse" may be similarly unclear.

Where it can be said that the words to be interpreted may, in themselves, be ambiguous then the rules of statutory interpretation operate as guidelines in determining the intention of the legislators.

2. Interpretative Guidelines

A. Introduction

At the very outset it must initially be noted that the general and overall purpose of the Canadian income tax legislation and the Alberta matrimonial property legislation is markedly separate and distinct.

The taxation legislation initially seeks to tax income of all individuals regardless of marital status[10]

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[8] (cont'd) infra.

[9] per McEachern, C.J.S.C. in Louis v. Esslinger [1981] 3 W.W.R. 350 at 370. This case is mentioned in matters pertaining to common law relationships in Canada, infra at 30 et. seq.

[10] In the first instance the fact of marriage is totally

and then, by specific alleviating provisions, provides exemptions or deductions to an individual having a prescribed marital status.

In contrast, the overall object and purpose of the Alberta matrimonial property legislation is remedial in scope as it seeks to redress those deficiencies previously extant in the common law by permitting an application by a spouse or former spouse for an equitable sharing of all property acquired during a marital relationship.[11]

While case law has it that taxation statutes are to be strictly construed both as to taxation and exemption,[12] the special interpretative rules that have evolved in matters of taxation may not be all that substantively different from the ordinary rules of general application to the interpretation of what may appear to be ambiguous provisions within any statute.[13]

---

[10] (cont'd)immaterial, Richardson v. M.N.R. (1955) 9 D.T.C. 200. Also, Canadian taxation is levied on the individual and not on a marital or family unit.

[11] For a commentary on the deficiencies see Lown and Bendiak, "Matrimonial Property - The New Regime", (1979) 17 Alta. L. Rev. 372 at 372-378.

[12] See Part IV *infra*.

[13] For a profound and contemporary analysis see C. MacNab, "Equity in Income Tax Cases", (1980) 28 C.T.J. 445.

B. The Rules of Statutory Interpretation

(a) The General Rules

Authoritative textbook writers[14] expound three major principles applicable to statutory interpretation of words which, when reduced to their simplest form, involve three basic concerns:[15]

(1) the ordinary and grammatical meaning of the word or words when read alone, i.e. the literal or plain meaning rule;

(2) the meaning when read together with the rest of the words in the enactment, i.e. context;

(3) the meaning when read against the background of that part of human conduct with which the enactment deals, i.e. object or purpose.

---

[14] For example, Maxwell, supra n. 5, Craies, supra n. 7 and E.A. Dreidger, Construction of Statutes (1974).

[15] See J. Willis, "Statute Interpretation in a Nutshell", (1938) 16 Can. Bar Rev. 1 at 4. The textbook authorities, id. generally refer to the three main rules as the "literal or plain meaning rule", the "golden rule" and the "mischief rule". The golden rule is a modification of the literal rule to avoid consequences resulting in some absurdity, repugnance or inconsistency with the rest of the enactment. The origin of the mischief rule is found in Heydon's Case (1584) 75 E.R. 637.

Where a wide term is found in a statute in association with other words its ordinary meaning may be limited or qualified by the principles of grammatical construction that have evolved.[16]

Simply stated, in circumstances where specific words precede a wide term, the latter takes its meaning from the specific: noscitur a sociis. Where specific words precede a wide and general phrase, the latter takes its meaning from the specific: ejusdem generis. Where specific words precede or follow a wide or general phrase, the latter takes its colour from the specific: expressio unis exclusio alterius.

These grammatical rules are not applicable unless there is a distinct genus: that is, both the specific and the wide or general must be of a class or kind comprised of characteristics common to both. If this is not the case then the meaning of a broad term should not be qualified on the basis of grammatical association.[17]

Moreover, where a statute defines something as including other things, it may not always be the case that the general word is to be interpreted in light of the specific, as the latter may be included as a deliberate extension of the ordinary meaning of the general term rather than merely to avoid doubt.[18]

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[16] For a summary see J. Willis, id. at 7-8.

[17] See Craies, supra n. 7 at 181-182.

Where the language used is found to be clear and unambiguous further interpretation is not necessary and the provision is to be strictly construed[19] unless it leads to some manifest absurdity, repugnance or inconsistency with the rest of the enactment thereby requiring modification of the plain meaning.[20]

If the language used is found to be unclear and ambiguous the provision is to be viewed firstly in light of similar words used throughout the Act (context),[21] failing which the ambiguity is to be resolved by adopting an interpretation that would be consistent with the intention of the legislators in enacting the provision (object or purpose).[22]

---

[18] See Maxwell, supra n. 5 at 292.

[19] See Craies, supra n. 7 at 64-65.

[20] See Craies, id. at 86. This represents the workings of the "golden rule", supra n. 15.

[21] See Craies, id. at 159-160. See also Maxwell, supra n. 5 at 278-289 for an analysis of matters pertaining to identical expressions and change of language found within an enactment.

[22] See Craies, id. at 96-98. This represents the workings of the "mischief rule", see supra n. 15.

(i) Aids to Construction

Various aids to construction have developed[23] in which consideration may be had to such matters as the title, preamble and interpretation clauses of and within the enactment,[24] judicial interpretation given under a prior statute,[25] dictionaries and treatises, interpretation statutes and the words as expressed in the other official language.[26]

(ii) Presumptions Affecting Interpretation

Various jurisprudential presumptions have evolved.[27] Of relevance is the presumption against change in the common law.

It is presumed that legislation does not alter the existing common law beyond that which is expressly stated in, or necessarily implied from, the language used in the enactment in question; the presumption therefore not being applicable where the language used is clear and unambiguous enunciating a clear intent of change.[28]

---

[23] For a concise summary see G.L. Gall, The Canadian Legal System (1977) at 232-236.

[24] See Craies, supra n. 7 at 190-216.

[25] See Craies, id. at 171-172.

[26] See G.L. Gall, supra n. 23 at 235.

[27] For a summary of the presumptions see G.L. Gall, id. at 236-239 and J. Willis, supra n. 15 at 20-27.

In the absence of a clear expression indicating intention of change, "references to personal relationships in an Act are presumed to connote those relationships as they are understood at common law"[29] and therefore a statute dealing with matrimonial causes would ordinarily extend only to monogamous marriages.[30] However the same may not pertain where the subject matter of the statute is categorized as other than a matrimonial cause.

In all doubtful matters where the language used is expressed in general terms, their construction should follow the rules of common law in cases of that nature, as statutes are not presumed to alter the common law further or otherwise than as expressly declared or found therein.[31] Where there may be a conflict between the common law and the express provision of a statute, the latter prevails.[32]

---

[28] See Maxwell, supra n. 5 at 116 and at 122. See also Craies, supra n. 7 at 338-340.

[29] Maxwell, id. at 120.

[30] Id. This statement is based on the decision in Sowa v. Sowa [1961] P. 70, [1961] 1 All E.R. 687 (C.A.) which adopted the decision in Hyde v. Hyde (see infra at 19) limiting the jurisdiction of the English courts to monogamous marriages and held that a wife in a polygamous marriage did not come within the statutory meaning of the phrase "married woman".

[31] See Craies, supra n.7 at 339.

[32] Id. at 338.

(b) Special Rules Applicable to Taxation Statutes

Some commentators refer to these rules as operative presumptions.[33] It is probably more accurate to classify them as extraordinary or special rules[34] that have evolved as additions or modifications to the overall general rules by which legislative intent to either impose a tax or provide for an exemption or deduction from tax is to be determined from the language used.[35]

That the burden is on the taxing authority to bring the subject within the letter of the law[36] and that the burden is on the subject to prove entitlement to a prescribed exemption,[37] is probably the basis for the well known proposition that tax statutes are to be strictly construed.

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[33] See G.L. Gall, supra n. 23 at 236 and J. Willis, supra n. 15 at 25.

[34] See C.MacNab, supra n. 13 in which the author enunciates the development of six special rules from the tax authorities cited.

[35] See Craies, supra n. 7 at 115.

[36] This is the rule as stated by Lord Cairns in Partington v. The Attorney General (1869) L.R. 4 H.L. 100. The explanation for the rule is subsequently given by Lord Cairns in Pryce v. Monmouthshire Canal Co. (1879) 4 App. Cas. 197 at 202 as being the absence of any a priori liability to pay tax or any antecedent relationship between the subject and the taxing authority. For the applicability of the doctrine of strict construction to those statutes whichimpose pecuniary burdens see Dreidger, supra n. 14 at 148-153, Maxwell, supra n. 5 at 256-258 and Craies, id. at 112-115.

Where there is a taxing provision which can be said to clearly impose a tax and where there is also a provision which alleviates this taxing provision,[38] the interpretative rule applicable to the latter is that where the language is clear and unambiguous[39] the provision is to be strictly construed and the taxpayer must show that every constituent element and condition prescribed by that provision has been complied with.[40]

Where the language in the alleviating provision is unclear or ambiguous, the words of the provision are to be read in light of similar words and expressions used throughout the Act,[41] and if this method resolves the ambiguity that is the one to be adopted.[42]

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[37] W.A. Sheaffer Pen Company Limited v. M.N.R. [1953] Ex. C.R. 251 at 255.

[38] The general charging provisions of the Income Tax Act are found in sections 2, 3 and 38. The Act also prescribes various "rules". An example of relevance is where the rules in subsection 73(1) may be seen to alleviate the operative effect of the rules in subsection 69(1).

[39] This would involve the application of the "literal or plain meaning rule", see supra at 7.

[40] W.A. Sheaffer Pen Company Limited v. M.N.R., supra n. 37. See also the comments of Cattanagh, J. in The Queen v. Scheller, infra at 79.

[41] This involves the application of the "context rule", see supra at 7.

Where the ambiguity is not then resolved by contextual construction, the rule is that it is to be resolved in favour of the taxing authority.[43] It is from the workings of the last rule that has led to the common expression that "taxation is the rule and exemption or deduction is the exception."[44] This represents a marked departure from the general rule under which reasonable consideration could have otherwise been given to the object or purpose of the alleviating provision in light of the Act as a whole in order to determine the intention of the legislators in enacting that provision.[45]

3. Summation

In a narrow and strict sense, the overall object and purpose of the Canadian taxing legislation and the Alberta matrimonial property legislation could be said to be separate and distinct, thereby rationalizing the departure from the ordinary rules of interpretation applicable to taxation exemption. However in modern times the real distinction may not always be that clear.

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[42] The Queen v. Compagnie Immobiliere BCN Ltee [1979] D.T.C. 5068 at 5072 (S.C.C.).

[43] The Queen v. Continental Air Photo Limited [1962] D.T.C. 1306 (Ex. Ct.).

[44] See MacNab, *supra* n. 13 at 452.

[45] MacNab, *id*. at 452-455. However, a recent trend may be developing in which general words may be interpreted in a broad rather than a technical way, see MacNab, *id*. at 454-455, but only if the wording in the tax exemption permitted such a construction, see R.A. Jodrey Estate v. Min of Finance [1980] C.T.C. 437 (S.C.C.) per Dickson, J. at 456.

> Over time, however, the Income Tax Act has become an important instrument of social and economic policy, not just an Act to raise revenue. Moreover, the complexities of our world are in large measure mirrored in the Income Tax Act, often resulting in a maze of verbiage to the uninitiated that the draftsman will tell you is necessary to 'cover' a particular situation or to carry out certain policy objectives. In many cases, even the most competent legislative draftsman will be unable to produce a result using only 'plain words'.[46]

Where a policy objective is not expressed in clear and unambiguous words in an exempting provision within a taxing statute, and it can not be clarified in a contextual manner, the objective behind this policy may fail - to the detriment of the person who was to receive its benefits.

It is clear that only a "spouse" or "former spouse", including a party to a void or voidable marriage, qualifies to receive the benefits under the Alberta matrimonial property legislation and to receive the benefits of the exemption[47] under subsection 73(1) of the Income Tax Act. It is the ordinary and plain meaning of these words that must firstly be examined.

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[46] MacNab Id. at 453.

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[47] The usage of the word "exemption" may not be technically correct as the effect of subsection 73(1) of the Act is to defer the immediate taxation consequences that would otherwise arise.

PART II: THE ORDINARY AND PLAIN MEANING

1. The Meaning of "Spouse"

A. Introduction

Loose usage of the descriptive word "spouse" invariably includes not only a relationship of marriage between a man and a woman but also one that has the outward appearance of being marital. However the latter is often one of living together "as man and wife" or living "common law" and arises either where the parties, not being married to each other, wish their cohabitation to have the outward appearance of marriage or where the cohabitation is of some duration and others are allowed to assume that the parties are each other's "spouse".

While it may be true that two people of the opposite sex may choose to live together in exactly the same way "as if" they were married, this may not _ipso facto_ make them spouses within the ordinary and legal meaning of that word.

B. The Dictionary Meaning

The primary source of the ordinary meaning would be found firstly by reference to authoritative dictionaries[48] to establish whether or not the meanings given in both sources are similar.

---

[48] The legal as well as the grammatical meaning should be ascertained, see _Craies_, _supra_ n. 7 at 83-84.

The Oxford English Dictionary (1971) describes a spouse as "a married woman in relation to her husband, a wife; a married man in relation to his wife; a husband": husband as "a man joined to a woman by marriage" and wife as "a woman joined to a man by marriage; a married woman".

Law dictionaries[49] describe a spouse as "a, or one's husband or wife". In Black's Law Dictionary[50] the word spousals is referred to and is stated to be defined in old English law as "mutual promises to marry": the word husband as "a married man, one who has a lawful wife living" and wife as "a woman united to a man by marriage, a woman who has a husband living and undivorced".

Accordingly it would seem that in a modern, ordinary and legal sense "spouse" is a sex-neutral word used to describe a man (husband) or a woman (wife), each of whom are related to the other by marriage to each other: "marriage" appears to be the essential factor.

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[49] Jowitt's Dictionary of English Law (2nd ed. 1977); Osborn, A Concise Law Dictionary (5th ed. 1964) and Black's Law Dictionary (4th ed. 1968).

[50] Id.

C. "Marriage": Meaning and Nature

(a) Introduction

As "marriage" is not statutorily defined in any Canadian enactment[51] its meaning would be influenced by such factors as its ordinary and grammatical sense and any judicial interpretation or definition, with due regard to the overall object and purpose of the particular statute involved.[52]

The Oxford English Dictionary describes marriage as "the condition of being husband or wife, the relation between married persons, spousehood"; and the word married as "united to another in wedlock, living in the matrimonial state".

The classical judicial meaning, which has been consistently followed and applied by both English and Canadian courts,[53] is that given by Lord Penzance in Hyde v. Hyde and Woodmansee:

> ... It creates rights and obligations, as all contracts do, but beyond that it confers a status ... I conceive that marriage, for this purpose, be defined

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[51] C. Davies, Power on Divorce and Other Matrimonial Causes, Vol.11 (3rd ed. 1980) at 2.

[52] E.A. Driedger, supra n. 14 at 6.

[53] C. Davies, supra n. 51 at 2.

> as the voluntary union for life of one man and one woman, to the exclusion of all others.[54]

The purpose of this meaning is stated to give "some pervading identity and universal basis [to the] common acceptance and existence [of marriage] however varied in different countries in its minor incidents".[55] This definition involves four conditions: the union must be between one man and one woman,[56] it must be voluntary,[57] it must be for life[58] and it must be monogamous.[59] However, although requiring a union, the definition does not deal with the means or method of entry into the status of marriage.

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[54] (1866), L.R. 1 P. & D. 130 at 133.

[55] Id.

[56] As determined biologically at birth, Corbett v. Corbett [1970] 2 All E.R. 33 in which one of the parties to a marriage had undergone a sex-change operation. See also Re North and Matheson (1975) 52 D.L.R. (3d) 280 in which both parties were male.

[57] True consent is essential. In Canada lack of consent renders a marriage void, C. Davies, supra n. 51 at 81.

[58] It must last for a lifetime unless sooner terminated by a judicial decree of dissolution, P.M. Bromley, Family Law (5th ed. 1976) at 16.

[59] Neither party may contract another marriage or take another spouse where a subsisting marriage exists. See C. Davies, supra n. 51 at 3-9 and authorities cited.

The general principle of law applicable to a man and woman who wish to enter into a valid marriage is twofold:[60] that is, they both must possess the legal capacity[61] to contract a marriage, which is determined by each party's lex domicilii, and observe the formalities,[62] which is determined by the lex loci celebrationis.

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[60] See C. Davies, id. at 25-26 and P.M. Bromley, supra n. 58 at 19-20.

[61] Generally, 'capacity' includes such matters as: the parties are not related within the prohibited degrees of consanguinity (blood) or affinity (marriage), are not already lawfully married to another, are of sufficient age, are of opposite sex, have the ability to consummate the marriage, freely consent to the marriage and possess the mental capacity to understand the nature of the contract and the duties and responsibilities which it creates. See C. Davies, id. at 75-89 in which these factors are described under matters relating to "Essential Validity". See also J. Jackson, The Formation and Annulment of Marriage (2nd ed. 1969) at 159-164.

[62] See C. Davies, id. at 26-28; P.M. Bromley, supra n. 58 at 25-29 and J. Jackson, id. at 210. In Canada the formalities are found in provincial Marriage Acts covering licencing (the pre-conditions of which may require parental consent, a medical certificate, a prescribed statement by the parties, etc.), ceremonial formalities and curative provisions. These statutory formalities are known as matters pertaining to solemnization of marriage within which the provinces have jurisdiction to legislate, Re The Marriage Law of Canada (1913), 7 D.L.R. 629, which may extend to enforcement of any breach by attaching statutory consequences of invalidity of a marriage, absolutely or conditionally, A.-G. (Alta.) v. Neilson and Underwood [1934] S.C.R. 635 and Kerr v. Kerr [1934] S.C.R. 72. Refer also to the Marriage Act, R.S.A. 1980 c. M-6, section 21.

It is to the latter that there may be limited exceptions,[63] one of which relates to the so-called "common law marriage", that is, where a man and woman, having the legal capacity to marry, voluntarily consent to and declare their present intention to live in a union for life to the exclusion of all others notwithstanding non-compliance with the formalities required by the *lex loci celebrationis* which may receive recognition by Canadian courts as a valid marriage. If this is the case then the ordinary and legal meaning of the words "spouse", "husband", "wife" or "marriage" in the Alberta Matrimonial Property Act and the Canada Income Tax Act would include that relationship.

(b) The "Common Law Marriage"

(i) Introduction

This terminology is a legal misnomer: it is more appropriately termed a "canon law" marriage as its origin lies in the canon law in those times when the canon law was accepted by the English common law. As succinctly put by Olive M. Stone:

> There is a great confusion about the use of the terms 'common law marriage' and 'common law husband' or 'common law wife'. A combination of ignorance of history and 'well-meaning sloppiness of thought' sometimes applies these terms

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[63] See C. Davies, *id*. at 18, P.M. Bromley, *id*. at 26 and J. Jackson, *id*. at 218.

> to the cohabitation of two people, at least one of whom is known to be legally married to another. This usage is indefensible. At common (canon) law such a cohabitation was not only meretricious; it was a deadly sin. The canon law lawyers did not transform adultery into bigamy and sanctify it.[64]

Stone suggests that the origin of the loose usage of the phrase "common law marriage" may have its source in the evidentiary rule of presumption of marriage emanating from long term cohabitation and general repute of marriage, as opposed to a presumption of illicit cohabitation until a valid marriage is proved. "This arises from the general presumption that anything done is lawfully done unless the contrary is shown. It is part of the general presumption of innocence and right conduct".[65] She continues:

> Where the common (canon) law marriage survives, by exchange of consents to present marriage or exchange of promises followed by cohabitation, as in Scotland until 1940, and in certain States in the U.S.A., there is clearly much greater latitude to assume that those cohabiting as husband and wife have exchanged such consents since acquiring capacity to marry each other.[66]

In this context it is to be noted that the presumption referred to does not in any way create a marriage under the common law, but rather is merely of evidentiary assistance in establishing the existence of a marriage.[67]

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[64] Olive M. Stone, Family Law (1977) at 30.

[65] Id.

[66] Id.

A review of the history of English marriage and its formalities is informative to determine a more precise meaning of the phrase "common law marriage" for the purposes of its judicial acceptance as a valid marriage.[68]

(ii) The English Historical Aspect

By the thirteenth century control over marriage in England rested with the canon law which recognized three ways in which marriage could be contracted:[69]

1. by celebration *in facie ecclesiae*, that is, with the blessing of the church. This was a regular marriage as distinct from a clandestine marriage.
2. by *sponsalia* (or *verba*) *de praesenti*. The parties in this case simply by uttering words denoting a present intention to accept each other as man and wife without any other ceremony thereby became husband and wife. No witnesses were required. If not consummated, such a marriage could be dissolved by the husband taking holy orders, or the wife becoming a nun; the other would then be free to marry.
3. by *sponsalia* (or *verba*) *de futuro subsequente*

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[67] C. Davies, *supra* n. 51 at 9-16.

[68] For a modern detailed analysis see J. Jackson, *supra* n. 61 Chapter 2, P.M. Bromley, *supra* n. 58 at 33-36, Olive M. Stone, *supra* n. 64 at 27-32, E.L. Johnson, *Family Law* (1958) at 1-10. See also Pollock and Maitland, *The History of English Law*, Vol. 2 (2nd ed. 1968) c. 7.

[69] E.L. Johnson, *id*. at 1.

> copula. If the parties had become betrothed by uttering words denoting a future intention to accept each other as man and wife, and thereafterwards intercourse ensued between them, the betrothal was thereby transformed into a valid marriage; a promise to marry became marriage on consummation.

Impediments to marriage were recognized by the canon law, some of which made the marriage merely sinful while others were impedimenta dirimentia (i.e. matters of consanguinity and affinity) rendering the marriage void and resulting in a divorce a vinculo matrimoni.[70]

On the other hand it was the common law courts that were concerned with property matters, i.e., the widow's right to dower and the right of the first-born son to claim freehold land as his father's heir, and denied those claims where the marriage had been celebrated other than by ceremony in facie ecclesiae.[71] Unblessed formless marriages continued to have validity until after the Tamesti Decree of the Council of Trent (1563) which expressly affirmed the existence of the old rules but henceforth required the presence of a priest and two witnesses as essential requirements. However by this time England had broken with Rome and the old law remained in force.[72]

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[70] Id. at 1-2.

[71] E.L. Johnson, id. at 5. See also Haydon v. Gould (1710) 1 Salk. 119.

[72] J. Jackson, supra n. 61 at 16. See also Collins v.

"For two hundred years the error of formlessness haunted the English institution of marriage"[73] which continued until Lord Hardwick's Marriage Act[74] was passed in 1753 which altered the canon law and laid down stringent formalities to be observed.[75] The Act was expressed not to be applicable beyond the English seas and required that, except for Jews and Quakers and any member of the Royal family, all marriages were to be celebrated according to the rites of the Church of England in the presence of a clergyman and of two witnesses after publication of banns on three consecutive Sundays. Any marriage celebrated otherwise was prescribed to be null and void. The strict voiding sections proved to be "draconian"[76] and its harshness was alleviated by subsequent amendments [77]

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[72](cont'd)Jesson (1703) 2 Salk. 437.

[73] Olive M. Stone, supra n. 64 at 29 and see particularly footnote 40 citing the abuses as outlined by W.E.H. Lecky, England in the Eighteenth Century: 'A multitude of clergymen, usually prisoners for debt and almost always men of notoriously infamous lives, made it their business to celebrate clandestine marriages in or near the Fleet' (prison). 'Almost every tavern or brandy shop in the neighbourhood had a Fleet parson in its pay ... (but) Divorce, except by a special Act of Parliament, was absolutely unattainable'.

[74] (1753) 26 Geo. 11, c. 33: "An Act for the better preventing of clandestine marriages".

[75] For particulars of the formalities see J. Jackson, supra n. 61 at 63-65.

[76] See Olive M. Stone, supra n. 64 at 30 and at 31 describing the vices of the enactment.

[77] Amending legislation in the form of Marriage Acts

and eventual repeal in 1949 by a consolidating statute.[78]

Commencing 1857 jurisdiction over marriage was transferred from the ecclesiastical to the secular (common law) courts,[79] the latter interpreting the voiding provisions of the Marriage Act, as amended, strictly:

> A distinction was drawn between provisions of the statutes which were directory in nature and those which were voiding. Negative and prohibitory words were not sufficient to render a marriage void. The statute had to show clearly, by express language, that the formal requirements were conditions precedent to a valid marriage. The courts still observed the common law presumption of the validity of a marriage when the parties cohabited as man and wife.[80]

Nonetheless during this time period a much criticized

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[77] (cont'd)(1822-1826) still included voiding provisions but were less stringent than the predecessor legislation. See J. Jackson, supra n. 61 at 66-70 and P.M. Bromley, supra n. 58 at 34-37.

[78] The Marriage Act, (1949) 12 & 13 Geo. 6, c. 75. See also Olive M. Stone, supra n. 64 at 30-32 and E.L. Johnson, supra n. 68 at 7-9.

[79] The Matrimonial Causes Act (1857) 20 & 21 Vict. c. 85. See E.L. Johnson, id. at 9-10.

[80] Per D.G. Friend, "Common Law Marriage in Ontario: The Alspector Case", (1958) U. of T. Fac. of Law Rev. 80 at 81-82 and note authorities cited in footnote 10-13. The classic example is found in the remarks of Dr. Lushington in Catterall v. Sweetman (1847) 163 E.R. 1047 at 1053: " ... a legislative enactment to annul a marriage de facto is a penal enactment ... and therefore [is] to be construed ... strictly."

decision of the House of Lords in Regina v. Millis[81] altered the existing common law and required the presence of an episcopally ordained priest at a marriage ceremony before a valid marriage could be contracted.[82] Subsequently, the House of Lords in Beamish v. Beamish[83] confirmed that Regina v. Millis had laid down a binding precedent to be followed, but left the question open as to whether or not it would apply to British subjects living in the colonies and in foreign countries.[84]

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[81] (1844) 8 E.R. 844. This was a bigamy case, the issue being the validity of a first marriage contracted in Ireland and presided over by a presbyterian minister. Millis subsequently went through a marriage ceremony with another woman in England in accordance with its laws. The House of Lords was evenly divided as to whether or not the common law of England and Ireland required the presence of an episcopally ordained priest as a condition of the validity of the first marriage, the rule semper praesumitur pro negante was applied and Millis was acquitted. This decision has been subject to criticism and its historical correctness has been questioned, Pollock and Maitland, The History of English Law, supra n. 68 at 372-374. See also remarks of Sir Jocelyn Simon in Merker v. Merker (1962) 3 W.L.R. 1389 at 1394.

[82] In Catterall v. Sweetman, (1847) supra n. 80 involving the validity of a marriage presided over by a presbyterian priest in New South Wales, Dr. Lushington not only confined Regina v. Millis to its facts and situation but expressed concern of its consequences upon those thousands of couples married in the colonies and the East Indies where there may not be any priests available.

[83] (1856-61) 11 E.R. 735.

[84] Id. per Lord Cranworth at 766 [353] and Willis,.J. at 758 [332].

Thus, at the time of Canadian Confederation in 1867, English common law had defined the meaning and nature of "marriage"[85] and had also resolved that the manner of entry into a valid English marriage was regulated and subject not only to those formalities declared by Lord Hardwicke's Marriage Act and its successors to be conditions precedent, but also to the common law requirement of the presence of a priest in accordance with the decision of Regina v. Millis; leaving open the applicability of English law on its subjects residing elsewhere.[86]

While it is very difficult to give a precise meaning to the phrase "common law marriage", it most likely refers to a marriage not contracted in accordance with the governing marriage solemnization legislation of the place of celebration, but which may nevertheless be valid under historic English common law rules.

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[85] As per Hyde v. Hyde and Woodmansee, see supra at 19.

[86] The settlors of a colony take with them such of the English laws as are reasonably applicable to the social and economic conditions of that colony. See Maclean v. Cristall (1849), Perry's Oriental Cases, 75, Breakey v. Breakey (1846), 2 U.C.Q.B. 349 (Upp. Can.), Wolfenden v. Wolfenden [1946] P. 61, Merker v. Merker supra n. 81. For analysis and commentary see J.E. Cote, "The Introduction of English Law into Alberta", (1964) 3 Alta. L. Rev. 262; see also C. Davies, supra n. 51 at 24, footnote 133.

(iii) The Canadian Current Aspect

Generally the law of Canada is that the validity of a marriage, in so far as the formalities are concerned, is governed by the lex loci celebrationis[87] and where it can be established that there was impossibility of compliance with the local law or no submission to the local law a marriage contracted at common law may be recognized.[88]

Statute law in the Canadian common law provinces and the territories,[89] applicable to marriages contracted in their jurisdiction, has almost completely supplanted the English common law formalities; and the whole question of the recognition of a marriage at common law that had been contracted within its jurisdiction turns on whether or not the English common law formalities have been effectively extinguished by such statutes.[90] The issues are complex and have been the subject of much debate,[91] and initially involve resolution as to whether or not the provisions of the applicable provincial statute as to formalities are mandatory and exhaustive or merely directive.[92] If not exhaustive, and thereby not mandatory, then due regard is to be had to the historical English legal position on marriage at common law, the reception date of the English law in that particular jurisdiction and the applicability of the English law in and to that jurisdiction[93] to determine whether or not a marriage at common law could be validly contracted. These questions have already been brought before the Canadian courts.

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[87] C. Davies, id. at 18. Each party having the requisite legal capacity to marry according to their lex domicilii may enter into a valid marriage even though it is celebrated outside the lex domicilii of one or both of the parties with the sole object of evading its formalities providing that, as to form it satisfies the laws of the place of celebration, J. Jackson, supra n. 61 at 216.

[88] C. Davies, id. at 18-23. See also P.M. Bromley, supra n. 58 at 27-28 and J. Jackson, id. at 218-226. The Canadian case law on native marriages all take isolation and remoteness into account as well as their customs pertaining to marriage, R. v. Nanequisaka (1885), 1 Terr. L.R. 211, Re Sheran (1899), 4 Terr. L.R. 83, Re: Noah Estate (1961), 36 W.W.R. 577 (N.W.T.T.C.). See also comment by C.O. O'Brien, "Eskimo Native Marriage--Common Law Marriage", (1962) 2 Alta L. Rev. 121 at 125.

[89] See Canadian Family Law Guide (Vol. 1 CCH) at 555-567, paragraphs 1145, 1150 for a summary of provincial marriage legislation. Provincial statutes that legislate as to the various steps or preliminaries leading to marriage, including prescribing consequences of invalidity for such non-compliance, have been held intra vires the provinces, Kerr v. Kerr, supra n. 62; A.-G. (Alta.) v. Neilson and Underwood, supra n. 62. See also C. Davies, id. at 91-96.

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[90] Native marriages may be a clear exception, see supra n. 88. It is clear that no province could legislate as to the capacity to marry, Ref: Re Marriage Act, [1912] A.C. 880 and, for commentary, see also L. Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage", (1975) Ottawa L. Rev. 384. Nor could the provinces create any relationship that is given the equivalent status of marriage without running headlong into federal jurisdiction over marriage. The British North America Act, 1867 allocates "marriage and divorce" power to the federal government and power over "the solemnization of marriages" to the provinces. To avoid creating a marriage status the provinces could presumably legislate as to the civil consequences of cohabitation under their "property and civil rights" powers dealing with property rights and maintenance obligations upon separation; for example, see the Family Law Reform Act R.S.O. 1980 c. 152, Part 11.

[91] See: L. Cherniak and C. Fien, "Common Law Marriages in Manitoba" (1974) 6 Man. L.J. 85, B. Pritchard, "Concepts of the Common Law Marriage" (1976) 21 R.F.L. 129, S. Gampel, "A Commentary on Pritchard's Concepts of the Common Law Marriage", 25 R.F.L. 271, A. Hilton, "The Validity of Common Law Marriages" (1973) 19 McGill L.J. 577, G.M. Keyes, "The Validity of Common Law Marriages in Ontario" (1958) 1 Osgoode Hall L.J. 58, D.G. Friend, "Common Law Marraige in Ontario: The Alspector Case", supra n. 80, R.M. Bryden, "Domestic Relations-Common Law Marriage-Application of English Law to Colony" (1964) 14 U.N.B.L.J. 60, L.G. Hinz, The Celebration of Marriage in Canada, Ottawa: U. of Ottawa Press, 1957 at 141-145. For recent court decisions see Dutch v. Dutch (1978) 1 R.F.L. (2d) 177 (Ont. Co. Ct.) and Louis v. Esslinger [1981] 3 W.W.R. 350 (B.C.S.C.) at 369-375.

In British Columbia, based on the wording of the Marriage Act in force in 1947, the Court of Appeal held that a de facto marriage performed by an unregistered clergyman to be a nullity, interpreting the applicable provisions of the Act as prohibitory and "so to deny the validity of a common law marriage performed in British Columbia".[94] In a recent case it was doubted that any marriage contracted in that Province not in accordance with the Marriage Act could be valid and that great mischief might result if it were otherwise.[95]

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[92] All of the provincial Marriage Acts have curative provisions through which many irregular marriages may be preserved - that is, it helps those marriages in which the parties are seen as having made some attempt or effort to meet with the formalities. The curative provisions however may not be available where the marriage lacks any solemnization by any person, whether authorized or not, Petschl v. Buchi (1926) 3 W.W.R. 598 (Alta. S.C.).

[93] See J.E. Cote, "The Introduction of English Law into Alberta", supra n. 86.

[94] Gilham (Steele) v. Steele (1953) 2 D.L.R. 89, per Bird, J. at 97.

In 1930 the Saskatchewan Court of Appeal was of the opinion that the provisions of their Marriage Act were merely directory[96] however in 1971 decided that, absent a marriage celebrated in accordance with the Act, the requirements as determined by Regina v. Millis must be met in order to establish a valid marriage contracted in that province.[97]

The main case on point in Manitoba did no better than declare that "the English view as laid down in Regina v.

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[95] Louis v. Esslinger, supra n. 91, per McEachern, C.J.S.C. at 374.

[96] Wylie v. Paton [1930] 1 D.L.R. 747. The action was for a declaration of nullity. The court also invoked the presumption favouring validity of the marriage.

[97] Ex parte Cote (1972) 22 D.L.R. (3d) 353. In this case an Indian couple were living together as man and wife with the consent of their parents with the intention of living together forever; however no evidence of marriage by Indian custom was introduced. The issue was whether or not the woman had the status of "wife" so that she could not be compelled to testify against her "husband" under the provisions of the Canada Evidence Act. Reversing the trial Judge, Maguire, J.A., premising that he was not considering the validity of a marriage by custom, held that the relationship was not a common law marriage as it lacked the Regina v. Millis requirements. For a commentary on Ex parte Cote see A. Hilton, "The Validity of Common Law Marriages", supra n. 91.

Millis is more rigid than the view generally held in most of the United States and in Canada"[98] and thereby presumably left open the possibility of a valid marriage at common law contracted in that jurisdiction.[99]

In Ontario, the broad curative provision of the Marriage Act may have the effect of preserving most "irregular" marriages and possibly even some common law marriages where the parties had shown good faith, some intention to comply with some law relating to marriage solemnization and thereafter had cohabited as man and wife.[100] For consensual marriages entirely outside the Act, early cases held that the English law requirements of solemnization had been received in Ontario.[101] A recent case holds that historical common law marriages are invalid and that "the only valid form of marriage that [the] province recognizes is that provided for in the Ontario Marriage Act".[102]

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[98] Blanchett v. Hansell [1943] 3 W.W.R. 275 at 280 (affirmed without reasons [1944] 1 W.W.R. 432). In this case both the legal wife and female cohabitee of 20 years were each claiming the benefits under an insurance contract in which the insured designated the cohabitee as his wife and beneficiary. A by-law of the fraternal society, under which the contract arose and which formed part of the insurance contract, expressly excluded a common law wife.

[99] For commentary see L. Cherniak and C. Fien, "Common Law Marriages in Manitoba", supra n. 91.

[100] The Marriage Act, R.S.O.1980 c. 256, section 46. For a case commentary and analysis on the historic interpretation and effect of the curative provision and its precursers see D.G. Friend, "'Common Law' Marriage in Ontario: The Alspector Case", supra n. 80 and G.M. Keyes, "The Validity of the Common Law Marriage in Ontario", supra n. 91.

[101] O'Connor v. Kennedy (1888) 15 O.R. 22, Lawless v. Chamberlain (1889) 18 O.R. 309.

In New Brunswick there have been no direct decisions on point, but one commentator has suggested that that province's Marriage Act had abolished historical common law marriages.[103]

Similarly there are no authoritative decisions in Alberta in which all of the issues have been examined and the matter resolved.[104] However there are two Alberta cases involving the validity of a ceremony of marriage purportedly defective in its formalities. In Petschl v. Buchi[105] it was held that the curative provisions of the Marriage Act then in force were not applicable in the absence of some sort of de facto ceremony notwithstanding the parties' intention to marry, their cohabitation and their long standing belief that they were married. Presumably the case was not argued on the alternative basis of a common law marriage as there is no mention of the requirements and applicability of English law in Alberta. In Hobson v. Gray[106] one of the parties to a marriage ceremony was below statutory age and had not obtained the prescribed parental consent. The court adopted the remarks of Dr. Lushington in Catterall v. Sweetman,[107] applied the strict construction doctrine and found the marriage ceremony valid and binding on the parties.

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[102] Dutch v. Dutch, supra n. 91 at 189. This is a case in which the parties were divorced and thereafter the former wife had commenced to cohabit with an unmarried male. The former husband asserted that he no longer had to pay her alimony as she had entered into a common law marriage with the other male. Phelan, Co. Ct. J. was of the opinion that the provisions of Lord Hardwick's Marriage Act were transported into Ontario and made the curious statement that Parliament had passed the Divorce Act, R.S.C. 1970, c. D-8 "on the premise that marriages at common law are not valid anywhere in Canada" (at 189).

[103] See R.M. Bryden, "Domestic Relations - Common Law Marriage", supra n. 91.

[104] The matter is the subject of analysis and commentary by B. Pritchard, "Concepts of the Common Law Marriage", supra n. 91 and by S. Gempel, "A Commentary on Pritchard's Concepts of the Common Law Marriage", supra n. 91. See also J.E. Cote, "The Introduction of English Law into Alberta", supra n. 86.

In the United States the issues of the reception of English law and the effect of marriage statutes are similar to that in Canada.[108] Currently only thirteen states still recognize the historical common law marriage[109] while some of the others have moved to expressly abolish them.[110]

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[105] (1926) 3 W.W.R. 598 (Alta. S.C.). The parties purchased wedding rings and a licence from a jeweller who was also an issuer of marriage licences but was not authorized to perform a marriage ceremony. The parties exchanged the rings in the presence of the jeweller, assumed this made them husband and wife and cohabited together in this belief for 10 years. It was held that as there was no ceremony there was no marriage that could be preserved under the Act.

[106] (1958) 25 W.W.R. (N.S.) 82 (Alta. S.C.).

[107] See infra at 37-38.

Therefore no general rule may be stated as to whether or not a historical common law marriage may be contracted in Canada. Marriage legislation and the reception date and applicability of English law would have to be examined in each jurisdiction.

(c) The Presumption of Marriage

[I]t must always be remembered that

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[108] See O.E. Koegel, Common Law Marriage and Its Development in the United States, Washington: Byrne, 1922; Holland Smith, "Common Law Marriage: What it is and How to Prove It", (1960) 12 S.C.L.Q. 355; L.A. Lavarto, "Family Law--The Elements of a Common Law Marriage" (1962) 11 Drake L.R. 64, J.R. Valeri; "Informal Marriages and Other Curative Devices" (1972) 17 How. L.J. 558; M.A. Glendon, "Marriage and the State: The Withering Away of Marriage" (1976) 62 Virginia L.R. 663.

[109] Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas. In Nevada, native custom marriages are recognized by statute. See H. Clark, Domestic Relations (2nd ed.), St. Paul: West, 1974 at 67.

[110] For e.g., Arizona Rev. Stats 25-11: (a) A marriage may not be contracted by agreement without a marriage ceremony; (b) A marriage contracted within this state is not valid unless: 1) a licence is issued as provided in this title and 2) the marriage is solemnized by a person authorized by law to solemnize marriages, or by a person purporting to act in such capacity and believed in good faith by at least one of the parties to be so authorized.

> marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favour of the validity and against the nullity of marriage, but it is so on this principle that a legislative enactment to annul a marriage de facto is a penal enactment... and therefore to be construed ... strictly.
>
> Catterall v. Sweetman
> (1847) 163 E.R. 1047 at 1053
> per Dr. Lushington

That there is a compelling presumption of a legal marriage following de facto celebration and reputable cohabitation as man and wife is without doubt;[111] however the presumption is rebuttable and the onus and degree of proof will depend on whether it is alleged that the marriage is defective as to form (formalities) or as to capacity (essentiality).[112]

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[111] In a majority of situations it is relatively simple to produce sufficient evidence that a marriage had taken place, that it was proper and regular in form and that the parties had the requisite capacity. As there may be difficulty in proving a foreign marriage by positive evidence, the presumption becomes operative which is rebuttable only by strong and weighty evidence to the contrary. A mere production of a marriage certificate is not strict proof of the marriage but raises the presumption of prima facie validity, Datzoff (Zavada) v. Miller (1962) 40 W.W.R. 464 (Alta. C.A.).

[112] See C. Davies, supra n. 51 at 9-16 and authorities therein.

As indicated earlier, the presumption does not create a valid marriage, it simply presumes the existence of its validity until shown to be otherwise.

(d) Void and Voidable Marriage

While usage of "void" in connection with the word "marriage" may be contradictory,[113] their juxtaposition arises out of situations where the existence of a putative marriage is in issue coupled with the consequential need to determine whether, in law, the marriage is either null and void at the outset or merely voidable; the distinction being explained thusly:[114]

> ... a void marriage is one that will be regarded by every court in any case which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction ... . The fact that in both cases the form of the decree is the same cannot alter the fact that the two cases are in this respect quite different.

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[113] Use of the word "nullity" in relation to void marriages and "annulment" in relation to voidable marriages would be more accurate.

[114] Per Lord Greene, M.R. in De Reneville v. De Reneville, [1948] P. 100 at 111 (C.A.).

Marriages that may in fact be void or voidable are subject to an application for a decree of annulment which is a matrimonial remedy different and distinct from divorce,[115] as the latter relates to termination of a marriage that is subsisting and valid in every respect.[116]

There are two notable and relevant distinctions between void and voidable marriages:[117]

1. A void marriage is invalid from the beginning and a decree of nullity is merely declaratory of the status of the parties. The decree may be pronounced either at the instance of one of the parties or by any other person having an interest, either during the lifetime or after death of

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[115] The Divorce Act, R.S.C. 1970 c. D-8, does not deal with annulment nor does it deprive the Supreme Court of Alberta of jurisdiction to deal with this issue, Board v. Board, A-G for the Province of Alberta, [1919] A.C. 956, Liptak v. Liptak [1974] 1 W.W.R. 108 (Alta. S.C.). Jurisdiction in each of the Canadian provinces and territories has its source in English law at and prior to 1857, see C. Davies, *supra* n. 51 at 41-49. For matters affecting jurisdictions and the choice of law to be applied see C. Davies *id*. at 66-70 and for matters affecting recognition of foreign decrees at 70-72.

[116] Termination of a valid marriage by divorce is based on a state of affairs or events which have occurred since the celebration of the marriage. The Divorce Act, *id*., section 3 uses the words "since the celebration of the marriage" and section 4 refers to "a permanent breakdown of [the] marriage by reason of ... ."

[117] See C. Davies, *supra* n. 51 at 41-44 for the historical background, at 57-60 for an analysis of the effect of a divorce or annulment and at 70-72 for matters pertaining to recognition of foreign nullity decrees.

either or both of the parties.

2. A voidable marriage is a valid marriage until a nullity decree has actually been made, the effect of which retrospectively renders the marriage void _ab initio_ and restores the parties to their original status as if they had never been married. However, pending an annulment decree, the parties retain the status of being married and any completed transactions between them would not be upset notwithstanding the retroactive effect of the decree.[118] No one other than the parties may make application and the decree must be made during their joint lives, failing which the marriage would be valid for all purposes and could not be questioned after death.

(e) _Polygamous and Potentially Polygamous Marriage_

The issues surrounding the validity of a polygamous and potentially polygamous marriage are difficult and fraught with some uncertainties.[119]

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[118] For example, see _Dodworth_ v. _Dale_ [1936] 2 All E.R. 440, 20 Tax Cas. 285 which is discussed _infra_ at 83.

[119] See C. Davies, _supra_ n. 51 at 2-9.

(i) Definition and Matters Affecting Validity

A marriage is polygamous if it is celebrated under a law which permits a person, during the subsistence of the marriage, without any change in his personal law, to take more than one wife or to take concubines if concubinage has a recognized status under that law, whether or not that person actually does so.[120]

A marriage is potentially polygamous until the party has exercised the right to take more than one wife or further concubines; thereafter it is actually polygamous.[121]

The nature and incidents of such a marriage is, in the first instance, to be determined by the lex loci contractus and, once ascertained, the issue as to whether or not the union is in fact monogamous is resolved by the forum according to its own laws.[122]

There is uncertainty as to which law governs matters pertaining to capacity to enter into such a marriage.

> 'It is not entirely settled whether a person whose status is governed by the law of an exclusively monogamous jurisdiction (such as a Canadian

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[120] Halsbury's Laws of England (4th ed.) Vol.8 at 346.

[121] Id. at 347, footnote 7.

[122] See C. Davies, supra n. 51 at 3.

> province) has the capacity to contract a polygamous or potentially polygamous union ... . [T]he weight of authority favours ... lack of capacity ... . [Such a marriage] is consequentially void.[123]

(ii) Jurisdiction of the Courts

In Hyde v. Hyde and Woodmansee[124] the English court declined jurisdiction to adjudicate upon or grant any remedies or relief under its matrimonial laws to the parties to a marriage that was seen to be potentially polygamous.

The effect of this rule is that, where the union is determined to be polygamous, the courts are without jurisdiction to make a declaratory order as to the status of the parties, or to grant a decree of nullity, or divorce, or judicial separation or restitution of conjugal rights or to grant maintenance or alimony to the parties.[125]

Notwithstanding the rule, a court may have jurisdiction to grant relief in a matrimonial cause if a polygamous marriage is determined to be monogamous at its inception,[126] or where such a marriage may be transmuted into a monogamous union,[127] or where the matter can be characterized as something other than matrimonial relief; [128] and has jurisdiction to pronounce upon the validity of a divorce dissolving such a union,[129] and to recognize the status of an existing polygamous marriage for the purpose of declaring a subsequent marriage to be void.[130]

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[123] Per C. Davies, id. at 3-4. Davies is of the opinion that it is the laws of the parties respective ante-nuptial domiciles that should govern. Authorities supporting opposing views are collected by James, "Polygamy and Capacity to Marry", (1979) 42 M.L.R. 533 at 535; (Note: acknowledgement of this source by Davies is to appear in a yet unpublished revision to the text.)

[124] See supra n. 54.

[125] See C. Davies, supra n. 51 at 7-9.

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[126] Id. at 7. Davies also suggests (at 5) that the time at which the nature of the marriage is to be considered is the time of the proceedings rather than the date of celebration.

[127] For example, where there is a change in the law of the lex loci celebrationis or by a change of events which that law recognizes as sufficient to change the nature of the marriage, or even perhaps by a change in domicile of one of the parties since the marriage, see Davies, id. at 5-6.

[128] A matrimonial cause is defined as generally those causes, actions or remedies that arise out of the incidents of a marriage that is valid; for example, causes relating to judicial separation, annulment, restitution of conjugal rights, alimony or maintenance and divorce: see Halsbury's Laws of England (3d) Vol. 12 at 213 and Black's Law Dictionary.

[129] See Lee v. Lau [1964] 2 All E.R. 248 and Khan v. Khan (1959) 29 W.W.R. 181 (B.C.S.C.).

[130] See Bandail v. Bandail [1946] 1 All E.R. 342, Kaur (or Kor) v. Ginder (1958) 25 W.W.R. 532 (B.C.S.C.). That the bar to the validity of the subsequent marriage may go to lack of capacity see supra n. 123.

(iii) Effects of a Polygamous Marriage

The parties to such a marriage have the status of married persons for matters other than those characterized as matrimonial causes.[131]

(iv) Summation

> When a question arises as to the recognition of a foreign marriage or construing words such as "wife", "marriage", "married woman", "husband", "child of the marriage" in a statute everything must depend on the purpose for which the marriage is to be recognized and the objects of the statute. A potentially polygamous marriage does not come within the meaning of "marriage" for the purposes of the Acts relating to matrimonial matters nor do the parties to it come within the words "wife", "married woman" or "husband". On the other hand, the word "wife" in a statute not relating to matrimonial matters may well include a wife who is a party to a polygamous marriage. In a similar vein where the claim of one spouse against the other can be characterized as something other than matrimonial relief the court may accept jurisdiction over the matter despite the fact that the spouses are parties to a polygamous marriage.[132]

The jurisdictional rule of Hyde v. Hyde has now been abrogated by statute in England[133] and has been modified by family property law reform statutes in Ontario and the Yukon Territory. Section 72 of the Ontario Family Law Reform Act[134] prescribes that the Act "applies to persons whose marriage was actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognized the marriage as valid." Section 2 of the Yukon ordinance[135] is of like effect. There is no similar provision in either of the Alberta matrimonial property legislation or the Canadian taxation legislation.

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[131] For example, in matters concerning succession rights, the legitimacy of children, and application of the rules of law concerning marital unity and marital coercion see Davies, supra n. 51 at 8.

[132] Per C. Davies, id. at 9.

(f) Cohabitation Without marriage

While a common understanding associated with the word "cohabitation" infers a situation of a man and woman living together "as man and wife", such an arrangement is not a marriage at all; it is merely living together in a relationship resembling marriage with no matrimonial intent in the minds of the parties.[136] This arrangement does not turn into a marriage of any kind by way of superficial appearances or holding out by the parties, birth of children, duration of cohabitation or presumption of marriage.

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[133] Matrimonial Causes Act, 1973, c. 18 s. 47(i).

[134] R.S.O. 1980 c. 152.

[135] The Matrimonial Property and Family Support Ordinance, O.Y.T. 1979 (2d) c. 11 as am. by 1980 (2d) c. 15.

The sequel to cohabitation may be marriage but only if the parties, then having the requisite capacity at law to do so, not only voluntarily and mutually agree to enter into a matrimonial union to the lifetime exclusion of all others, but also celebrate this agreement according to the requisite formalities of the place of celebration. It is only where there may be an incurable defect in the formalities that the marital union may or may not be recognized as a marriage at common law.

(g) Judicial Separation

The effect of a decree of judicial separation,[137] while described in the modern sense as effectually being a divorce without the right to remarry,[138] suspends the duty of marital cohabitation and ordinarily lapses if the parties are reconciled.[139] At all times the status of the marriage remains unaffected[140] so therefore the parties would ordinarily come within the meaning of "spouse" during their joint lifetimes.

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[136] The living together may be due to the lack of capacity to marry and/or may be solely for the purposes of sharing common living expenses, companionship, testing personal compatibility, etc. with each reserving the right to withdraw from the relationship, unmarried, at any time irrespective of whether there are any children born of the relationship, see Louis v. Esslinger, supra n. 91. Another factor indicating lack of intent to marry could be a negative experience or loss of alimony payments from a previous marriage, see Dutch v. Dutch, supra n. 91 at 187.

[137] This was historically known as a divorce a mensa et thoro in the ecclesiastical courts but was changed to a judgment of judicial separation in 1857, see C. Davies, supra n. 51 at 152. As to general matters pertaining

D. Summation

Apart from any extended or restrictive statutory definition prescribed for its own purposes or the effect of other enactments that may be recognized as influential, the ordinary and legal meaning and nature of "spouse" pertains to a living man (husband) or a living woman (wife), each of whom are related to each other by a valid and subsisting marriage to each other; the marriage attracting a recognized status to which each country is entitled to attach its own conditions, both as to creation and termination.

The concept and meaning of "marriage" is the fulfilment of the parties' contract to marry, satisfied by solemnization of the marriage.

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[137] (cont'd)to judicial separation see C. Davies, *id*. c. 7.

[138] C. Davies, *id*. at 153.

[139] C. Davies, *id*. footnote 1 at 152 and authorities cited.

[140] *Id*.

A marriage will be recognized as valid if the parties are capable by their own personal laws of marrying one another and the formalities of the place of celebration have been complied with.[141]

A marriage at common law has been recognized as valid notwithstanding a defect only in its formalities where it was determined that conformity to the local form of marriage was impossible or the parties had not submitted to the local law.[142] A marriage at common law may be recognized where it is determined that the prescribed local formalities may not be wholly exhaustive and mandatory in view of all the circumstances[143] or may not be applicable in the case of native parties who have celebrated their marriage in accordance with established native customs.[144]

A decree _nisi_ of divorce does not terminate the marriage and, if one of the parties dies before the granting of the decree absolute, the survivor is the spouse of the deceased immediately before death and is a widow or widower upon the other's death.[145]

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[141] Discussed _supra_ at 21.

[142] See _supra_ at 30.

[143] See as discussed _supra_ at 31-37.

[144] See _supra_ n. 88.

[145] See C. Davies, _supra_ n. 51 at 313-316 and authorities cited.

Cohabitation is entirely separate and distinct from a common law, void or voidable marriage as it lacks all matrimonial connotation,[146] and thus the parties would not ordinarily come within the meaning of "spouse".

A marriage that is void is merely an attempt to marry and, strictly construed, is a nullity at the outset and, as such, the "marriage" is non-existent. Either of the parties, or any interested person, may at any time impeach a putative marriage that is void in order to receive a judicial declaration of the true legal status of the parties involved. The parties to a marriage that is determined to be void are not, nor ever have been, each other's husband or wife, and therefore in a strict sense would never have been each other's spouse.[147]

A marriage that is voidable is a marriage for all purposes until annulled at which time it is then retroactively considered to be a nullity. The validity of the marriage may be put in question only by the parties during their joint lives and, pending final determination, they are married, are husband and wife, and are therefore within the ordinary and strict meaning of "spouse".[148]

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[146] Discussed _supra_ at 46-47.

[147] As discussed _supra_ at 40-41; but see _Irving A. Taylor_ v. _M.N.R._, [1982] C.T.C. 2845 (T.R.B.) discussed _infra_ at 85-89.

[148] Discussed _supra_ at 41.

However the legal consequences that flow from a decree of annulment of a voidable marriage result in an anomaly; that is, the "marriage" may be viewed as never having been in existence, the parties will never have been each other's husband or wife, and therefore strictly speaking they will not have been each other's spouse.[149]

Where the matter can be identified as a matrimonial cause, the ordinary meaning of spouse would not include the parties to a polygamous marriage. However, the parties to a potentially polygamous marriage may ordinarily be "spouses" where such a marriage is valid on the basis that it was monogamous at its inception or had in fact been transmutted into a monogamous union or where the matter in issue is other than for relief in a matrimonial cause.[150]

2. The Meaning of "Former Spouse"

A. Introduction

The Oxford English Dictionary defines the word former as "Earlier in time. Now chiefly in the more specific sense: Pertaining to the past, or to a period or occasion anterior to that in question." A logical assumption can be made that one has had to have been a "spouse", that is, a party to a valid marriage, before one can come within the prima facie meaning of "former spouse".

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[149] See C. Davies, supra n. 51 at 58-60. See also Re Bradley and Minister of Finance (1974) 46 D.L.R. (3d) 446 (B.C.C.A.).

[150] Discussed supra at 43-44.

> In English law a valid marriage may be terminated only by the death of one of the parties or by a decree of dissolution or divorce pronounced by a court of competent jurisdiction. The death of either party ipso facto brings the marriage to an end.[151]

B. After Termination of Marriage by Divorce

By the Divorce Act (Canada) a decree absolute of divorce given in Canada abrogates the marriage status of the parties to the former marriage so that each may marry again;[152] the decree having legal effect throughout Canada.[153] The Act has also created a statutory ground of recognition of foreign divorces granted after July 1st,

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[151] per P.M. Bromley, Family Law, supra n. 58 at 235.

[152] The Divorce Act, supra n. 115. Sections 5 and 6 confer jurisdiction to entertain a petition for divorce on the provinces and territories. By subsection 13(1) every decree of divorce is in the first instance a decree nisi which does not terminate the marriage. If, pending pronouncement of the decree absolute, one of the parties dies the survivor is a widow or widower, C. Davies, Power on Divorce and Other Matrimonial Causes, Vol. 1, (3rd ed. 1976) at 315-316. By section 16 the parties are given the unrestricted right to marry again after a decree absolute is pronounced. See also Re Christians and Hill (1981) 123 D.L.R. (3d) 471 (Alta. Q.B.) at 474.

[153] The Divorce Act, id. section 14.

1968.[154] Whether or not a decree of divorce given in a foreign jurisdiction prior to that date would be recognized as valid in Canada would have to be determined in accordance with the common law principles that had previously evolved.[155]

It is clear that after obtaining a decree absolute of divorce the parties are no longer married and therefore are no longer each other's spouse. While each would logically come within the ordinary meaning of being each other's "former spouse" during their joint lives, upon the death of one the survivor would clearly not come within the ordinary meaning of "surviving spouse", "widow" or "widower" as the case may be,[156] but nonetheless may still be seen as coming within a colloquial meaning of "former spouse".[157]

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[154] Id. subsection 6(2). For commentary see C. Davies, supra n. 152 at 308-309.

[155] For an examination of the applicable common law principles, recognition of non-judicial divorces, the doctrine of preclusion and the effect of an invalid foreign divorce see C. Davies, id. at 302-311.

[156] See In re McDonald [1943] 2 W.W.R. 97 (Alta. C.A.), Colgan v. Dept. of Health for Scotland [1937] S.C. 16, Re Norman's Will Trusts (1840) 87 Sol. Jo. 186, and Kliman v. Winchworth (1933) 17 Tax Cas. 569. See also Stroud's Judicial Dictionary (1974) for judicial definitions of "widow" and "widower" and illustrative authorities cited.

[157] Reference to a deceased spouse as a "former spouse" is not uncommon usage: see Rodney Hull, "Is a Deceased Spouse a Former Spouse under Sections 7 and 8 of the Family Law Reform Act?", (1980) 13 R.F.L. (2d) 174 at 176.

C. After Annulment of a Void or Voidable Marriage

(a) The Void Marriage

As the effect of the decree of annulment is merely a declaration of the true unmarried status of the parties, neither could technically fall within the ordinary and legal meaning of "former spouse" either during their joint lives or as survivor after death of the other as, strictly speaking, neither had originally been each other's spouse in the first place.[158]

(b) The Voidable Marriage

Given that the parties to a voidable marriage that has been annulled by judicial decree may be viewed in strict legal terms as never having been married, each are thereupon not, nor ever have been, a spouse and ergo may not legally and strictly be viewed as a "former spouse" either during their joint lives or as survivor upon the death of the other.[159]

D. Judicial Separation

During their joint lives the parties retain the status of marriage at all times[160] and therefore are ordinarily each other's spouse following pronouncement of judicial separation. After the death of one, the survivor would be ordinarily viewed as the "spouse" of the deceased and therefore presumably within the ordinary meaning of "former spouse", as the event of death is viewed in English law as a termination of a valid marriage.[161]

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[158] Discussed supra at 39, 40 and 50.

[159] Discussed supra at 39, 41, 50 and 51.

[160] Discussed supra at 47-48.

E. Summation

Apart from any extended or restrictive statutory definition prescribed for its own purposes or the effect of other enactments or judicial meanings that may be accepted as influential, the ordinary and legal meaning of "former spouse" would include those parties to a valid and subsisting marriage that had been terminated either by the death of one or by a decree of divorce pronounced by a court of competent jurisdiction.

The parties to a marriage that had been pronounced void or voidable would not be within the strict meaning of "former spouse" but may possibly come within an extension of its common and ordinary meaning on the basis that an attempted or de facto marriage had, at least, taken place. Much would depend on the purpose for which the expression is used.

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[161] Discussed supra at 52.

That the former parties to a marital relationship that was one of cohabitation (i.e. living "common law" or "as man and wife") may be seen as former spouses would be mere colloquialism.

PART III THE INCOME TAX ACT

1. Introduction

The governing rules applicable to transactions involving anything entered into by and between non-arm's length parties[162] are found within subsection 69(1) of the Income Tax Act. In general terms these rules provide that where the transferor has received no proceeds or proceeds of less than the fair market value of the thing transferred, the transferor is deemed to have received proceeds equal to its fair market value. If the amount received is greater than its fair market value, the transferor is deemed to have received proceeds equal to its fair market value but the transferee's cost of acquisition is limited to its fair market value for tax purposes.

Subsection 73(1) provides for an exemption from the effects of the aforementioned rule by permitting what is colloquially called a tax-free "rollover" where transfers of capital property have been made to the following persons:

(a) The spouse of the transferor;

(b) a former spouse of the transferor, in settlement of rights arising out of their marriage;

(c) a trust created by the transferor under the terms of which only his spouse is entitled to receive or otherwise obtain the use of any of the income or capital of the trust during his spouse's lifetime;

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[162] That married persons are fiscally deemed not to deal at arm's length see paragraphs 251(1)(a), 251(2)(a) and 251(6)(b) of the Income Tax Act.

(d) an individual, pursuant to a decree, order or judgment of a competent tribunal made under prescribed provincial laws, if that individual either entered into a written agreement in accordance with those prescribed laws or was one of a prescribed class of persons described therein.

If the parties to a transaction of any particular capital property come wholly within the four corners of any of these exemptions,[163] the rules in subsections 73(1) and 73(2) view it as a non-taxable event and the transferee is deemed to step into the place of the transferor for fiscal purposes. The taxation consequences that would otherwise have arisen at that time are thereby deferred to the time when the transferee disposes of the property.[164] Accordingly, the fiscal benefits afforded by this exemption could represent considerable tax savings to a taxpayer who seeks to come within its provisions as a spouse or former spouse for its purposes.

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[163] Both the transferor and transferee must be resident in Canada at that time for the purposes of paragraphs 73(1)(a), (b) and (d). Both the transferor and the trust must be resident in Canada at that time for the purposes of paragraph 73(1)(c). In all cases the transferor may elect not to have the rollover apply.

[164] For a succinct analysis see Bissett-Johnson, Holland, Matrimonial Property Law in Canada (1980), ch. 'Taxation' by McNair at T-17 to T-23. See also Interpretation Bulletin No. IT-325 R dated December 28, 1982.

In this respect the current provision of the Income Tax Act reads as follows:

> 73(1.2) For the purposes of subsection (1), 'spouse' and 'former spouse' includes a party to a void or voidable marriage, as the case may be.

As noted previously the word "includes" is generally used in an interpretative clause as an enlargement to the ordinary meaning of the preceding words and, when so used, it is to be construed as comprehending not only such things as the preceding words ordinarily signify, but also those things which are prescribed to be included.[165]

Therefore an analysis of the meaning of "spouse" and "former spouse" as used in subsection 73(1.2) is called for and any ambiguities therein being resolved not only by viewing the words within the context of this subsection but also in light of similar words or like expressions used throughout the Act.

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[165] For authorities see R. v. Girone and Genoe (1953) 9 W.W.R. (N.S.) 255 (B.C.C.A.), In re Income Tax Act, 1932, In re Saskatchewan Co-operative Elevator Co. Ltd. [1933] 3 W.W.R. 669 (Sask. K.B.), R. v. Hall (1955) 14 W.W.R. 241 (B.C.C.A.), Wardle v. Manitoba Farm Loans Association and Government of Manitoba (1953) 9 W.W.R. (N.S.) 529 (Man. Q.B.) and Huber v. Regina (City) (1956) 19 W.W.R. 657 (Sask. D.C.). That the words "shall include" do not imply a complete and exhaustive enumeration, see Ricard v. Lord [1941] S.C.R. 1 at 10-11.

2. The Act as a Whole

Part XVII of the Act currently does not provide any definitions or interpretative meanings assigned to the terms "spouse" or "former spouse" for its purposes.[166]

Apart from subsection 73(1), there are other and diverse provisions throughout the Act employing usage of the words spouse,[167] former spouse,[168] husband and wife[169] and marriage,[170] or combinations thereof:[171] all without definition. Of importance however is the notable presence of other provisions in which the fact of non-marriage is explicitly[172] or impliedly[173] dealt with. Therefore it may be said that as the Act as a whole does contain provisions referrable to marriages and former marriages on the one hand, and unmarried cohabitation on the other, the meaning of "spouse" and "former spouse" would thereby exclude unmarried cohabitees who are or had been living "as husband and wife" or "common law". There are no current specific provisions abrogating the ordinary and common law meaning of spouse or former spouse other than in subsection 73(1.2) which is stated to be for the purpose of subsection 73(1).

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[166] This may be otherwise if the amendments in Bill C-139 tabled in the House of Commons on December 7, 1982, are implemented; see infra at 74.

[167] As there are many such provisions only a few pertinent examples will be mentioned: see paragraphs 70(6)(a) and (b) - the surviving spouse; section 74 - the spousal attribution rules; and subsection 160(1) - joint spousal liability for tax.

[168] For example, paragraph 54(g)(i) - the inhabitation of a principal residence by a "former spouse".

[169] For example, subsection 58(5) - deduction for annuity payments and subsection 74(5) - business partnerships (now repealed but effective for fiscal periods ending before December 11, 1979).

[170] For example, in Part XVII paragraphs 251(1)(a), (2)(a) and (6)(b) - persons are "related" or "connected" if one is married to the other.

[171] For example, "spouse" is used in conjunction with "marriage" in paragraph 109(1) which permits a married status deduction and which has been the subject of judicial interpretation, see infra at 80-83. See also subsection 160.1(2) deaing with joint liability for tax. In Part XVII "former spouse" is used in conjunction with marriage dissolution in subsection 248(1) which prescribes an interpretative meaning of "separation agreement".

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[172] Paragraph 109(1)(b) permits an amount that may be deductible by an "unmarried" individual who supported a person who was wholly dependent on him for support. Subsections 63(1) and (2) deal with child care expenses that may be deductible by a man or woman who is "not married" and subsection 63(4) assumes that a child of a woman and a man who were living together "without being married to each other" is ordinarily in the custody of the woman and not in the custody of the man.

[173] For the purposes of the Act paragraph 251(1)(b) provides that it is to be a question of fact whether persons not related to each other (i.e. unmarried) were at any particular time deaing with each other at arm's length. That this provision may relate to or have effect on cohabitees is the subject of commentary by D. Keith McNair in W.H. Holland, Unmarried Couples - Legal Aspects of Cohabitation, (1982) c. 9 at 200-201.

3. Subsections 73(1) and 73(1.2)

A. Contextual Analysis

A contextual analysis of the whole of the exempting provisions of subsection 73(1) reveals a consistency with the distinctive categorization between parties who are or had been married on the one hand and ones who are or had been unmarried cohabitees on the other hand that is found within the Act as a whole.

Paragraphs 73(1)(a) and (c) refer to a spouse, paragraph 73(1)(b) refers to a former spouse in settlement of rights arising out of marriage and paragraph 73(1)(d) refers to and means, on analysis, an unmarried cohabitee that is within a prescribed class of persons referred to in a prescribed provincial law.[174]

However the matter does not end here. The contextual aspect of subsection 73(1.2) itself should also be examined. Void and voidable marriage is mentioned therein only by way of inclusion. It may be that it is the intention of the legislators that this inclusion is merely an extension to an otherwise broad meaning of "spouse" and "former spouse" which could include all manner of spousal-type relationships, whether within marriage, former marriage or unmarried cohabitation. It is submitted that there is no need to resort to the rules of grammatical construction[175] in this respect, as any ambiguity that may exist within this subsection could be resolved within the context of subsection 73(1) to which it is expressed to be applicable.

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[174] In paragraph 73(1)(d) of the Act the "prescribed class of persons" and the "prescribed provisions of the laws of the province" are as prescribed in Part LXV of the Regulations which currently refers, for both purposes, to the Ontario Family Law Reform Act paragraph 14(b)(i), which entitles an unmarried cohabitee to apply for and receive a property support order under its paragraph 19(1)(c), or to receive property under a cohabitation agreement under its section 52.

The meaning of "former spouse" in subsection 73(1.2) would be resolved by reference to the provisions of paragraphs 73(1)(b) to which it relates, that is: "a former spouse...in settlement of rights arising out of...marriage". The combined and resulting effect is that there is a clear statutory intent to abrogate the common law meaning of "former spouse" and thereby include parties to a marriage that had been declared to be void or a voidable marriage that had been annulled _ab initio_. Also the common law anomaly arising out of the retrospective effect of a decree annulling a voidable marriage is thusly resolved for these fiscal purposes.[176]

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[175] Discussed _supra_ at 7 _et_. _seq_.

[176] That there is an anomaly extant at common law see _supra_ at 51.

Resolution of the meaning of "spouse" in subsection 73(1.2) is resolved in a similar contextual manner. While paragraphs 73(1((a) and (c) simply refer to a "spouse" without mention of marriage, the provisions of paragraph 73(1)(d) do recognize a separate category of individual who is, on analysis, an unmarried cohabitee that is within a prescribed class of persons referred to in a prescribed provincial law.[177] In like manner, the combined and resultant effect is that there is a clear statutory intent to abrogate the common law meaning of "spouse" (that is, the parties to a marriage that is valid in every respect) to include the parties to a putative marriage that is invalid in every respect.

Therefore the statute has abrogated the ordinary and common law meaning of "spouse" and "former spouse" for fiscal purposes, but currently only in relation to subsection 73(1); the extent of such abrogation would not include parties that are or had been unmarried cohabitees.

One final observation should be made. Subsection 73(1.2) may be separated into two parts. The first part is that "spouse" includes a party to a void or voidable marriage and the second part is that "former spouse" includes a party to void or voidable marriage; both parts being subject to the words "as the case may be". It is submitted that the case that is to be is that the word "spouse" could only relate to a void marriage as, under the common law, a person in a voidable marriage is a spouse;[178] and "former spouse" would relate to both a void and a voidable marriage which has been annulled ab initio as technically under the common law a person would not be a "former spouse" under either of these circumstances.[179]

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[177] For the analysis of this clause, see supra n. 174.

B. The meaning of "void marriage"

The voidable marriage has the distinctive common law feature that it is valid in every respect until annulled so there is no difficulty in determining its meaning. However the meaning that may be attributed to a void marriage may be problematical in that its interpretation may be restricted for fiscal purposes to conform with the underlying principles currently found in provincial family property enactments wherein proprietary remedies that may be conferred or exercised thereunder are not available to an applicant spouse who is unable to show that the marriage was entered into in good faith and without knowledge that it was void.[180] In response to this it is arguable that any such prohibitive feature in applicable provincial family law legislation should not be of any relevance for fiscal purposes as they may be mere procedural bars solely for provincial law purposes and thereby do not necessarily preclude the parties to such a void marriage from freely entering into mutual property transactions for any reason.

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[178] See supra at 41 and 50.

[179] See supra at 54.

Regard may also be given to common law jurisprudence wherein proprietary rights were determined on the basis of whether or not good faith had been shown.[181]

Notwithstanding the above it should be noted that subsection 73(1.2) of the Income Tax Act has not sought to impose any restrictions attributable to void marriages, nor has it defined it, nor is there anything in the Act itself that could be used as a justification for any such restricted meaning.

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[180] See the Alberta Matrimonial Property Act, supra n. 2, section 2; the Ontario Family Law Reform Act, supra n. 134, paragraph 1(f)(iii); the Matrimonial Property Act, 1979 (Sask.), c. M-6.1, paragraph 2(k)(ii); the Marital Property Act, 1978 (Man.), c. 24, subsection 2(3); the Matrimonial Property Act, 1980 (N.S.), c. 9 paragraph 2(g)(iii).

[181] See Re Eaves [1939] 4 All E.R. 260, Re Dewhirst [1948] 1 All E.R. 147. While these cases do not involve the concept of good faith as it relates to knowledge that a marriage is void at its inception, nonetheless they are of relevance to the concept itself.

C. "In Settlement of Rights Arising out of Marriage"

Another matter that presents difficulties is that the Income Tax Act provides no definition applicable to the meaning of the phrase "in settlement of rights arising out of marriage" which is the required condition in paragraph 73(1)(b) and which is applicable only to former spouses whose marriages have been terminated by divorce or annulment. There is nothing in the Act to serve as a background for interpretation.

It is conceivable that former spouses who do not have a court order in this regard may encounter difficulties with this general phrase in view of the fact that it is found within an exempting provision which is normally subject to the strict construction rules.[182] Because the phrase is so broad and ambiguous, resort would presumably have to be made to its object and purpose in light of the laws governing the former spouses in this respect.

4. Other Tax Implications

There is a further aspect arising out of the meaning of "spouse" to which Parliament had not addressed itself prior to November 12, 1981.[183] This occurred because the extended meaning of spouse, as including a party to a void marriage, had not been legislated for the purposes of the attribution provisions within section 74 or the joint and several liability for tax provisions within section 160; all of which resulted in somewhat of an anomaly.

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[182] See infra at 78-80.

[183] For the proposed amendments see infra at 74.

The section 74 rules[184] are colloquially known as the attribution rules. They prescribe that any income or loss arising from property transferred inter vivos since 1917 between spouses, or persons who have since become spouses, be attributed back to the transferor while the parties are still spouses. As a capital gains tax was implemented in 1971 the rules further prescribe that any taxable capital gains or allowable capital losses, or gains or losses, arising from any subsequent real or deemed disposition of property transferred inter vivos between such persons after 1971 and while they are still spouses is also to be attributed back to the transferor. The section 160 rules[185] were designed to preclude the transferor spouse from becoming judgment proof for fiscal purposes through transferring all his property to his spouse or to a person who had since become his spouse. These rules provide that such a transferee is jointly and severally liable for all the transferor's unpaid taxes to the date of the transfer to the extent of the value of the property so transferred. It is clear that both of the above rules were applicable only to persons who were or had become each other's "spouse" at the particular time.

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[184] 74(1) Where a person has on or after August 1, 1917, transferred property ... to his spouse, or to a person who has since become his spouse, any income or loss, as the case may be ... shall, during the lifetime of the transferor ... and the transferee is his spouse, be deemed to be income or a loss ... of the transferor and not of the transferee.

74(2) Where a person has, after 1971 transferred property ... to his spouse, or to a person who has since become his spouse ... the following rules apply ... .

[185] 160(1) Where a person has ... transferred property ... by any ... means whatever,

A spouse in a valid and subsisting marriage would be subject to the effects of the attribution rules pertaining to income or loss and capital gains or allowable capital losses until separation or divorce,[186] and would be jointly and severally liable for tax notwithstanding any separation or subsequent divorce. However the same would not pertain to the parties to a void marriage wherein they would have been considered to be spouses for and would thereby have received the benefits of an inter vivos tax free rollover of

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[185] (cont'd)(a) to his spouse or to a person who has since become his spouse ...

the following rules are applicable ... .

For decisions made under these provisions see Thorsteinson v. M.N.R. [1980] C.T.C. 2415 (T.R.B.), Payette v. M.N.R. [1979] C.T.C. 2052 (T.R.B.) and Fisher v. M.N.R. [1979] C.T.C. 2271 (T.R.B.).

[186] See subsections 74(7) and 74(8).

property pursuant to paragraphs 73(1)(a) and (c), but would not have been considered to be spouses for the attribution rules in section 74 nor would they have been subject to the joint and several liability for tax provisions in section 160.

The Act and interpretative doctrines should be canvassed to see whether or not an unintended "loop-hole" has been created. In this respect it is unlikely that the interpretative doctrine pertaining to overlapping provisions could have been employed to alter this anomaly because the purposes of subection 73(1), section 74 and section 160 are mutually exclusive. As these provisions are not statutorily interrelated in their operation it is unlikely that they could have been viewed as standing together so that the one or the other could have been seen to be a special one coming within the general as required by this doctrine. [187]

Accordingly the general tax avoidance provisions of the Act may provide an answer and therefore should be examined.[188]

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[187] Applied in A.W. Bardsley Trust v. M.N.R. [1982] C.T.C. 2642 (T.R.B.) at 2646-2647. For case commentary see E.R. McDonnell (1982) 30 C.T.J. 712.

[188] The rules in subsections 56(2) and (4) would not apply as they deal with indirect payments and transfer of income rights respectively.

Subsection 55(1) of the Act is directed to preclude tax avoidance "where the result of ... transactions of any kind whatever is that the taxpayer has disposed of property under circumstances such that he may reasonably be considered to have artificially or unduly (a) reduced the amount of the gain from the disposition, (b) create a loss from the disposition, or (c) increased the amount of the loss from the disposition". If this occurs then the disposition "shall be computed as if such reduction, creation or increase ... had not occurred". Obviously the answer would not lie here.

Subsection 245(2) of the Act may be of relevance notwithstanding that is has been historically applied as a catch-all measure to unmask circuitous and disguised forms of reward for services rendered, or gifts made, through "one or more sales, exchanges, declarations of trust or other transactions of any kind whatever".[189]

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[189] 245(2). Where the result of one or more sales, exchanges, declarations of trust, or other transactions of any kind whatever is that a person confers a benefit on a taxpayer, that person shall be deemed to have made a payment to the taxpayer equal to the amount of the benefit conferred notwithstanding the form or legal effect of the transactions or that one or more other persons were also parties thereto; and, whether or not there was an intention to avoid or evade taxes under this Act, the payment shall, depending on the circumstances, be

(a) included in computing the taxpayer's income for the purposes of Part I,

(b) deemed to be a payment to a non-resident to

It is notable that "whether or not there was an intention to avoid or evade taxes under [the] Act" is prescribed to be totally irrelevant.[190]

The workings of subsection 245(2) is that if on looking at any transaction or series of transactions a benefit had been conferred to which some monetary value could be attached then the donor is deemed to have made a payment to the donee equal to the value of the benefit which is then classified according to its true nature. If the benefit represents some form of payment of income then paragraph (a) or (b) of the subsection applies, depending on whether the recipient is resident or non-resident in Canada. If it is classified as a gift, paragraph (c) of the subsection applies, attracting the taxation rules previously mentioned and as found within subsection 69(1). However the opening

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[189](cont'd)which Part XIII applies, or

(c) deemed to be a disposition by way of gift.

[190] This subsection, or its precursor, has been applied to deem a payment of income to have been made arising out of (a) sales or exchanges resulting in corporate dividend stripping; Conn Smythe et al. v. M.N.R. [1969] C.T.C. 558 (S.C.C.), David v. The Queen [1975] C.T.C. 197 (F.C.), for contra see Jobin v. The Queen [1979] C.T.C. 493 (F.C.A.); (b) retroactive declaration of trust, Pasadena Development Corp. Ltd. v. M.N.R. [1969] Tax A.B.C. 567 and (c) debt forgiveness; M.N.R. v. Enjay Chemical Co. Ltd. [1971] C.T.C. 535 (F.C.T.D.). Also the subsection, or its precursor, has been applied to deem a gift to have been made out of share acquisitions, see M.N.R. v. Dufresne [1967] C.T.C. 153 (Ex. Ct.) and Applebaum v. M.N.R. [1971] Tax A.B.C. 237, Sewell v. M.N.R. [1968] Tax A.B.C. 358.

words of subsection 69(1) read: "[e]xcept as expressly otherwise provided in this Act". All non-arm's length gifting transactions between the donor and his spouse in a valid marriage, and the donor and his spouse in a void or voidable marriage, thereby falls back into the exempting and tax-free rollover provisions in paragraphs 73(1)(a) and (c) which are the applicable taxation rules "otherwise provided for" in the Act and to which the extended meaning of spouse, to include a party to a void marriage, applies. Accordingly it appears unlikely that the application of subsection 245(2) could have altered the anomaly.

The only remaining provision in the Income Tax Act is section 246.[191] This section gives the Treasury Board the broadest possible powers to determine whether or not one of the main purposes of a transaction is "improper" avoidance or reduction of taxes "that might otherwise have become payable" under the Act. No decided cases under this section could be found. A reasonable assumption could be advanced that this section would not be applicable as in no sense could the factual circumstances of a transfer of property between spouses to a void marriage give rise either to impropriety or a reduction of tax that might otherwise have become payable under the Act.

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[191] 246(1). Where the Treasury Board has decided that one of the main purposes for a transaction or transactions...was improper avoidance or reduction of taxes that might otherwise have become payable under this Act...the Treasury Board may give such directions as it considers appropriate to counteract the avoidance or reduction.

The result is that there was an unfairness prior to November 12, 1981, as spouses to a void marriage would have been better off, fiscally, than the spouses to a valid marriage.

5. Bill C-139 and the Proposed Amendments

A. Subsection 160(1)

Clause 107(1) of Bill C-139 tabled in the House of Commons on December 7, 1982, would repeal subsection 160(1) of the Act and substitute a new subsection in its place which is to be applicable to transfers of property occurring after November 12, 1981.

Once enacted the new subsection would not only continue to be applicable to spouses or persons who have since become spouses but would also apply to persons with whom the transferor was not dealing at arm's length. The effect will be that if the transferor and transferee are not or have not become spouses but rather are parties to a marriage that is void, they would be jointly and severally liable for the transferor's unpaid tax under the new subsection if they are factually found not to be dealing with each other at arm's length at the particular time.

However the anomaly and unfairness previously mentioned is only partially resolved for property transactions occurring after November 12, 1981. That this is so is due to the fact that persons who are married to each other are nonetheless deemed conclusively not to deal with each other at arm's length, irrespective of actual factual circumstances to the contrary.[192] The consequence is that the adversarial parties to a void marriage would still be in a distinctly more favourable position, fiscally, than adversarial parties who are or were married and are caught specifically by section 160(1)(a).

B. Subsection 73(1.2)

Clause 41 of Bill C-139 would repeal subsection 73(1.2) of the Act applicable after 1981, and correspondingly by clause 130 therein proposes to amend section 252 in Part XVII of the Act by adding thereto the following subsection:

> 252"(3) For the purposes of paragraphs 56(1)(b) and (c), 60(b) and (c) and 146(16)(a), sections 56.1 and 60.1 and subsection 73(1), 'spouse' and 'former spouse' includes a party to a voidable or void marriage, as the case may be."

Once enacted the extended meaning of spouse and former spouse would be applicable not only to those persons already within the exempting provisions of subsection 73(1) but also to those persons within the following transactions or matters:

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[192] See Wurtele v. M.N.R. [1963] C.T.C. 167 (Ex. Ct.)

(a) alimony payments made between spouses or former spouses by virtue of and who are separated pursuant to a divorce, judicial separation or written separation agreement [paragraph 56(1)(b) and subsection 60(b)];

(b) maintenance payments pursuant to a court order made between spouses or individuals described in paragraph 73(1)(d) who are living separate and apart [paragraph 56(1)(c) and subsection 60(c)];

(c) for the purposes of deeming receipt and payment of alimony payments made by virtue of a decree, order, judgment or written agreement between spouses former spouses or an individual within subsection 73(1) if they are living separate and apart [section 56.1] and similarly to maintenance payments [section 60.1]; and

(d) payment or transfer of funds out of a registered retirement savings plan pursuant to a written separation agreement or a decree, order or judgment relating to a division of property between spouses or former spouses in settlement of rights arising out of their marriage, on or after breakdown of the marriage and if they are living separate and apart [paragraph 146(16)(a) as proposed to be amended by clause 98(9) of Bill C-139].

It is to be noted that the amending provisions, while including additional exempting provisions in the Act to which it is to be applicable, is nonetheless effectively a repetition of the current extended meaning of "spouse" and "former spouse" presently prescribed only for the purposes of subsection 73(1) aforesaid.

Revenue Canada'a position is set out in their interpretation bulletin IT-118R dated August 30, 1976, dealing with the alimony and maintenance provisions then in the Act, and is as follows:

> 3. For the purposes of the provisions of the Act discussed in this Bulletin, a common law husband or wife does not qualify as a spouse.

It is unlikely that the amendment aforesaid would modify this position.

Revenue Canada's position as set out in their Interpretation Bulletin No. IT-325R dated December 28, 1982 dealing with property transfers after divorce or annulment should also be noted. Paragraph 8 within is of particular interest in that it is stated:

> 8. Generally, in cases of the annulment of either void or voidable marriages, provisions in the Income Tax Act relating to spouses will apply to the parties of annulled marriages between the time of the supposed marriage and the declaration of annulment. In respect to transfers after 1978, subsection 73(1.2) provides that, for purposes of subsection 73(1), "spouse" and "former spouse" includes a party to a void or voidable marriage, as the case may be, with the result that a "former spouse" includes both a divorced person and a party to a marriage which has been annulled. The proposal in the Notice of Ways and Means Motion of June 1982, to repeal subsection 73(1.2) and to replace it with subsection 252(3) will not affect the result described in the preceding sentence.

The first sentence of paragraph 8 may be technically incorrect if it purports to interpret the provisions in the Act to which the amendments in Bill C-139 do not specifically apply and to which the Bulletin is not specifically directed. For example, neither the attribution provisions of section 74 previously mentioned, nor the marital deduction provisions of subsection 109(1)(a) mentioned infra,[193] nor the tax-free rollover provisions available to a surviving spouse under subsections 70(6) and 70(6.1) also discussed infra,[194] are the subject of the proposed amendments.

In any event the amendment would not affect the contextual aspect either of the Act as a whole or of subsection 73(1) wherein the provisions pertaining to married or formerly married persons and those pertaining to unmarried cohabitees are separate and distinct. If anything the distinction is enhanced by the amendment which purports to bring the extended meaning to a greater number of specified exempting provisions.

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[193] See pages 80 to 83.

[194] See pages 96 to 100.

6. The Doctrine of Strict Construction

A. Introduction

This long standing doctrine not only is of application to provisions that seek to impose a tax but also is generally adhered to when interpreting an exempting provision as is exemplified in the following judicial statement:

> [I]n construing a taxation statute it must be borne in mind that taxation is the general rule. An exemption from taxation is the exception and an exempting provision must be strictly construed. A taxpayer cannot succeed in claiming an exemption from income tax unless his claim falls precisely within the four corners of the exempting provision. The taxpayer must show that every constituent element is present in his case and that every condition required by the exempting section has been complied with.[195]

In R.A. Jodrey Estate v. Min. of Finance Dickson, J. referred to the recent English decision of Sansom v. Peay in which Brightman, J. was of the opinion that as there was no duty to ensure that a tax exemption applied it would not be permissible to construe it in a broad manner in order to achieve this end unless the wording permitted such a construction.[196]

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[195] The Queen v. Scheller [1975] C.T.C. 601 (F.C.T.D.) per Cattanagh, J. at 605.

[196] [1980] C.T.C. 437 (S.C.C.) at 456.

Concerning an interpretative approach to the meaning of words used in a taxation statute, it has been held that:

> If we depart from the plain and obvious meaning of the words of the Act, we do not then construe the Act but we alter it. If the words are precise, no more is necessary than to accept these words in their ordinary and natural meaning.[197]

It now remains to be seen as to how, and under what circumstances, the tax courts have applied this doctrine in interpreting words used in taxing legislation importing some form of subsisting or formerly subsisting marital status of a taxpayer seeking to come within an exempting provision.

B. The Tax Cases

(a) Cohabitation

In The Queen v. Scheller[198] the defendant and his female cohabitee lived together under a moral but unprovable certainty that her husband had been killed in enemy territory, but which nonetheless precluded them from marrying in Estonia. While observing that the defendant's responsible attitude toward support of his putative spouse was to be commended, Cattanagh, J. applied the doctrine of strict construction[199] and denied the availability of paragraph 109(1)(a) which permitted a marital deduction from income to "a married person who supported his spouse". He commented:

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[197] Per Audette, J. in O'Reilly and Belanger v. M.N.R. [1917-27] C.T.C. 332 (Ex. Ct.) at 335.

[198] Cited supra n. 195.

[199] Quoted supra at 79.

> "The adage is that marriages are made in Heaven and in compliance with that adage [they] considered themselves married ... . The spiritual and temporal authorities do not accept this adage. The stark and irrefutable fact remains that [they] were not married to each other.[200]

Historically the tax tribunals have consistently denied the married status deduction in paragraph 109(1)(a) to a taxpayer who had supported but had neither married, nor had attempted to marry, the person with whom he was reputedly living as husband and wife.[201] In most of the reported decisions an impediment to marriage was noted in that the taxpayer claiming the deduction was admittedly already married to another (who was not the recipient of the support claimed) and it had not been shown or established that the previous marriage had been terminated.

In the most recent case of McPhee v. M.N.R. [202] the appellant taxpayer supported, cohabited with and was reputed within the community to be married to his putative wife for some eighteen years. On holding that the appellant was not a married person who supported his spouse Board member M.J. Bonner noted:

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[200] The Queen v. Scheller, supra n. 195 per Cattanagh, J. at 604.

[201] See No. 673 v. M.N.R. (1959-60) 23 Tax A.B.C. 240, Schapira v. M.N.R. (1965-66) 40 Tax A.B.C. 223, Sokil v. M.N.R. [1968] Tax A.B.C. 337, Toutant v. M.N.R. [1978] C.T.C. 2671 (T.R.B.).

[202] [1980] C.T.C. 2042.

> It is not necessary to decide whether the admitted fact that the appellant never went through any form of marriage ceremony ... is an effective bar .... [T]he appellant was already married ... and it was not shown that the marriage ... was terminated, either by death or divorce. Annulment was not mentioned.[203]

This case had a further interesting feature in that the appellant taxpayer also sought to have the extended meaning of "spouse" under the Old Age Security Act applicable to his situation by reason of the reference within paragraph 110(1)(f) of the Income Tax Act to spouse's allowance under the Old Age Security Act.[204] The response of Bonner, M.J. was succinct:

> The word 'spouse' is not defined in the Income Tax Act. It is to be given its ordinary meaning, that is to say, a married woman in relation to her husband or the reverse. No authority or logical reason was advanced as a basis for what was, in effect, a submission that an extended definition of a word in one statute should be applied when the meaning of that word in another statute is under consideration. It should be observed that the opening words of section 2 of the Old Age

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[203] Id. at 2043.

[204] R.S.C. 1970, c. O-6 section 2 as am. by 1974-75, c. 58, s. 1(2): "'spouse' in relation to a pensioner includes a person of the opposite sex who has lived with the pensioner for three or more years where there is a bar to their marriage or at least one year where there is no such bar and the pensioner and that person have publicly represented themselves as man and wife".

> Security Act are 'In this Act'.[205]

The taxpayer's appeal was thereby dismissed.

Revenue Canada's position is set out in their interpretation bulletin IT-191 dated December 23, 1974 dealing with section 109 exemptions, which is as follows:

> 15. Where two people are living together as husband and wife but are not legally married according to the law of Canada, one such person may not claim a deduction in respect of the other under paragraph 109(1)(a) since the other person does not qualify as his or her spouse.

(b) The Voidable Marriage

In the English case of Dodworth v. Dale[206] Inland Revenue was precluded from claiming a refund of tax foregone on a marriage allowance that had been claimed by a husband for the support of his wife during the subsistence of their voidable marriage notwithstanding the common law effect of the decree of annulment (given at the instance of the husband) pronouncing the marriage void *ab initio*. The reasoning was thusly:

> There are ... no authorities which doubt the proposition ... that what has been done during the continuance of the *de facto* marriage cannot be undone, cannot be overturned by the operation of law. [I]t appears ... that the Finance Act ...

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[205] McPhee v. M.N.R., *supra* n. 202 at 2043.

[206] [1936] 2 All E.R. 440.

> ought to be read as applying to a wife who is de facto a wife living with her husband, one whose marriage has not yet been avoided.[207]

Concerning the power to make the new assessment the finding was as follows:

> [I]t seems ... that both the Finance Act ... and the other sections of the Income Tax Act relate to facts as they exist at the time. [T]he husband ... had exercised his option to avoid the marriage. That was not a mere declaration of the law; it was a new fact that came into existence which may not have come into existence at all ... . [T]he revenue authorities had no power to make an assessment ... in this case ... by reason of the facts which came into existence after those years.[208]

This decision is clearly supportive of the common law meaning attributable to the term "wife" as used in the Finance Act then in force in that not only was that marriage valid and subsisting at the time the marital deductions were taken by the husband but also in that the retroactive effect of an annulment of a voidable marriage, while nullifying the marital status, does not nullify completed transactions made while that marriage was subsisting.[209]

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[207] Per Lawrence, J. id. at 447-448.

[208] Id. at 448-449.

[209] As noted, supra at 41.

(c) The Void Marriage

In the very recent Canadian tax case of Irving A. Taylor v. M.N.R.[210] the appellant taxpayer had gone through a marriage ceremony with a woman whose Mexican divorce was brought into question by him some eight years later. Pending judicial determination of the validity of their marriage, the appellant was ordered by the Ontario Supreme Court to pay interim alimony to the woman, the amounts whereof he sought to deduct pursuant to subsection 60(b) of the Income Tax Act which permitted such deduction if made to a "spouse" or "former spouse" of the payor. Prior to the tax hearing the Ontario Court had declared the marriage a nullity by reason of the woman's prior existing marriage. The Minister of National Revenue had disallowed the deduction for the reason that these payments had not been made to a spouse or former spouse within the meaning of subsection 60(b) on the basis that the marriage had been a nullity from the time of its inception.

L.J. Cardin, Q.C., Chairman of the Tax Review Board, held that the circumstances that existed at the time the alimony payments were ordered to be made should govern and therefore allowed the deduction. He expressed his reasons thusly: [211]

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[210] [1982] C.T.C. 2845 (T.R.B.).

[211] Id. at 2846. Note that if the amendment as proposed in

> I cannot however accept that the definition of 'spouse' or 'former spouse', used specifically with respect to the inter-vivos transfer of property of a spouse, can or should be used in relation to the application of paragraph 60(b) of the Act, notwithstanding the general rules on the interpretation of Statutes. Nor can I accept that paragraph 60(b) of the Act can in any way be considered as a penal clause ... .
>
> The Courts have interpreted the required conditions of [paragraph 60(b)] restrictively but, to my knowledge, the question of defining the term 'spouse' or 'former spouse' for the purposes of [this paragraph] has never before risen.
>
> The evidence ... is that, for a period of some eight years, she was his de facto spouse following what was supposed to have been a marriage ceremony. While the words 'spouse' or 'former spouse' are not defined in the Income Tax Act, there is no section which prohibits the inclusion of a de facto spouse ... .

Mr. Cardin appears to have adopted the appellant taxpayer's position that if a civil tribunal, for the purposes of interim alimony, does not at that time inquire into the validity of the marriage once a de facto marriage has been established then a tax tribunal should approach the matter in a similar fashion in interpreting the undefined words "spouse" and "former spouse" for taxation purposes.

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[211] (cont'd)clause 130 of Bill C-139 discussed supra at 75-76 had been in effect at the relevant time then this issue would not have arisen. The amendment is proposed to be applicable after 1981.

The authority for the civil approach is set out in the decision and is derived from judicial opinion expressed therein that:[212]

> ... once a de facto marriage has been acknowledged and established, alimony will be awarded pendente lite; the determination of the parties' rights de jure is not a relevant consideration on the application for interim alimony.
>
> Whatever may be *de jure* the position of the plantiff, she admittedly has *de facto* the status of wife, resulting not from some frivolous association nor from what is popularly called a 'common law marriage' but from some years of cohabitation following an apparently regular form of marriage. Until the court has determined her rights *de jure* (and it may be found that she is the defendant's wife in every sense) there is no reason why she should not be allowed alimony in the usual way.

Notwithstanding that at the time of the tax hearing the marriage was then judicially known to have been a nullity, Mr. Cardin came to the conclusion that the amounts paid by the appellant represented alimony paid pursuant to an order of a competent tribunal to a spouse or former spouse within the meaning of paragraph 60(b) of the Act in that:[213]

> [w]hile the tax issue must be decided according to the *Income Tax Act*, the board cannot, in my view, in interpreting the word 'spouse' in paragraph 60(b) of the Act, ignore as a fact of this appeal, the basis on which

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[212] *Id*. at 2847.

[213] *Id*.

> the Ontario Supreme Court granted interim alimony. At the time the appellant was ordered to pay alimony ... a de facto marriage existed ... and while the ... Court may have declared the de jure aspect of the marriage null and void, [she] nevertheless was the de facto spouse or former spouse of the appellant ... and as such was granted the interim alimony by a competent tribunal. In the absence of a clear definition of the word 'spouse' or 'former spouse' with respect to alimony payments, I do not believe the Board should look beyond the above facts in interpreting paragraph 60(b) of the Act.

It is notable from the above that even the status of "former spouse" may have been attributable in the circumstances.

This decision is now on appeal to the Federal Court. While it is hard to quarrel with what appears to have been an equitable result, the eventual outcome will nonetheless be of considerable interest as to how some of the relevant issues will be resolved: namely, the application of the doctrine of strict construction in interpreting words as used in an exempting provision of the taxing statute, and whether or not there is integration or non-integration of the common law with fiscal interpretative concepts as they relate to the meaning of "spouse" and "former spouse", and particularly whether or not the common law meaning of these terms, which ordinarily excludes a void marriage, may conceivably have been modified perhaps for all fiscal purposes. It is the latter aspect which is the Pandora's box as it contains within it, inter alia, the marital deduction permitted to a married person who supported his spouse pursuant to paragraph 109(1)(a), the attribution provisions of section 74, the tax-free rollover provisions applicable to property passing to the surviving spouse of a deceased person pursuant to subsections 70(6) and 70(6.1) and the joint end several liability for tax provisions in section 160.

7. The Polygamous Marriage and the Plurality of Spouses

As a matter under the Income Tax Act presumably could not be said to be one involving a matrimonial cause,[214] a party to a marriage that is polygamous would have the status of being married and therefore would be, during the subsistence of this marriage, a "spouse" for the purposes of the Income Tax Act. At least the Act does not specifically provide to the contrary.

While no reported income tax cases could be found on this point, there is one Canadian authority that has dealt with the meaning of the word "wife" in provincial succession duty legislation in which two wives to a polygamous marriage claimed exemption from duty that would have otherwise been payable on inherited moveable property.

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[214] A matrimonial cause is defined as generally those causes, actions or remedies that arise out of the incidents of a valid marriage; for example causes relating to judicial separation, annulment, restitutuion of conjugal rights, divorce, alimony or maintenance; see supra n. 128.

In the case of In re the Succession Duty Act, Lee Sheck Yew v. A.G. for British Columbia[215] the deceased, a Chinese subject and domiciled in China, died while temporarily resident in British Columbia, leaving a will and property in that province. The deceased had married two wives in China which permitted polygamous marriage. Both wives claimed the right to exemption from succession duty on the basis that each was a "wife" within the meaning of the British Columbia Succession Duty Act then in force. The five justices of appeal presiding were unanimous in holding in favour of the two wives as being entitled to the exemption. The court found that the matter was not a question of a matrimonial cause, noted the absence of definition of the word "wife" in the Act and that by the provisions of the Interpretation Act then in force words importing a singular number were to include the plural. Martin, J.A. observed that the Act itself presented no obstacle to the claim of the two wives and that it was not unimportant to note that the Act's definition of "child" was framed in such a "liberal and humane" way that it was an indication that the legislature was not approaching domestic relations in a narrow way but rather in a "broad and modern spirit".[216] He was of the further opinion that:

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[215] [1924] 1 W.W.R. 753 (B.C.C.A.).

> Definitions of 'marriage' in matrimonial suits ... are of little, if any, assistance, showing rather what is to be avoided than followed.[217]
>
> [E]ither polygamous marriages are void ab initio or they are likewise valid ... .[218]
>
> The difficulty in [this case] ... is caused by the fact that this purely taxing statute ... has been erroneously approached as if it was the English Divorce Act, or some statute of similar nature, under which conflicting litigants ... assert their domestic rights ... .[219]

Macdonald, C.J.A. stated:

> It was argued that the Legislature must be presumed to have had in mind a wife by Christian marriage only, but the true presumption is that the Legislature knew the state of the law and legislated in light of it.[220]

As noted earlier, there is no restricting definition of the meaning of "spouse" in the Income Tax Act for its purposes. In paragraphs 73(1)(a) and (c) of the Act the singular words "his spouse" or "the spouse" have been used. Subsection 26(7) of the Interpretation Act[221] provides that

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[216] Id. at 760.

[217] Id. at 761.

[218] Id. at 765.

[219] Id. at 768.

[220] Id. at 757

[221] R.S.C. 1970 c. I-23.

"[w]ords in the singular include the plural, and words in the plural include the singular". As "marriage" is also not defined in the Income Tax Act, it may thereby be impossible to apply any restrictive meaning since the Act itself does not do so.[222]

It is notable that section 72 of the Ontario Family Law Reform Act[223] provides that:

> This Act applies to persons whose marriage was actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognized the marriage as valid.

Section 2 of the Yukon Matrimonial Property and Family Support Ordinance[224] is of like effect. Alberta has no similar provision.

If an adjudication had been made in Ontario whereby capital property was ordered to be transferred as between the spouses that are found to be within their section 72 provisions, the question may not necessarily be fully answered for fiscal purposes in view of the implications that may arise out of the recent decision in W.E. Hillis Estate v. The Queen.[225]

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[222] See The Royal Bank of Canada v. Deputy Minister of National Revenue for Customs and Excise [1982] C.T.C. 183 (S.C.C.) at 185.

[223] Cited supra n. 134.

[224] Cited supra n. 135.

[225] [1982] C.T.C. 293 (F.C.T.D.); now on appeal.

This case involved an order made in favour of a deceased's widow under the Dependant's Relief Act of Saskatchewan and the implications of its retroactive effect on the time limits prescribed within the provisions of subsection 70(6) of the Income Tax Act.[226] The issue appears to have been resolved by the application of a general presumptive rule that the Crown is not bound by a statute unless named in it[227] which resulted in the finding that the retroactivity prescribed by that provincial enactment

> [has] no effect upon the right of Her Majesty to collect taxes to which she is entitled under the provisions of the Income Tax Act.[228]

The principle arising out of this case may be influential if section 72 of the Ontario legislation is sought to be ignored for fiscal purposes.

However it is not unimportant to note that a plurality of spouses may exist for fiscal purposes entirely outside that arising from a polygamous marriage. For example a person may at the same time not only be a party to a valid and subsisting marriage but may also be a party to a putative marriage that is void. By subsection 73(1.2) "spouse" includes a party to a void marriage and paragraphs 73(1)(a) and (c) simply refer to "his spouse" or "the spouse". In other words, the Income Tax Act itself does not make any distinction between the status of a spouse in a valid marriage on the one hand and the status of a spouse in the void marriage on the other but rather includes both, and the benefits of paragraphs 73(1)(a) and (c) would thereby be applicable to both, even if occurring at the same time. Therefore it is difficult to perceive any rationale which would justify the preclusion of these benefits to the spouses of a polygamous marriage on the basis of there being a plurality of spouses.

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[226] Subsection 70(6) is reproduced in the text of the decision, id. at 295. This subsection is discussed infra at 96-100.

[227] Id. at 298. In Alberta the Family Relief Act, R.S.A. 1980 C. F-2 s. 11 has such a provision.

[228] Per Smith, D.J. id. at 299. For a case commentary see R.B. Thomas, (1982) 30 C.T.J. 708.

In any event this issue would arise only if both the spouses were resident in Canada as required by subsection 73(1) of the Act at the time the capital property transfer had been made. No decided cases could be found involving the entitlement of one spouse in a valid polygamous marriage to sponsor the admittance of his one or more spouses into Canada.[229] Whether or not this is possible would be determinable under the Canadian immigration laws. Section 4 of the current Immigration Regulations, 1978 states:

> 4. Every Canadian citizen and every permanent

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[229] For a case concerning admission of a "child" of a polygamous marriage, see Regina and McDonell v. Leong Ba Chai [1954] 1 D.L.R. 401 (S.C.C.).

> resident may, if he is residing in Canada ... sponsor an application for landing made
>
> (a) by his spouse

and subsection 2(1) reads:

> 2(1). "spouse", with respect to any person, means the person recognized under the laws of any province of Canada as the husband or wife of that person.

8. Judicial Separation

At common law a decree of judicial separation does not alter the marital status of a party to a marriage[230] so that each would come within the ordinary meaning of "spouse" until the marriage is terminated by decree absolute of divorce obtained during their joint lives.

There are no provisions in the Income Tax Act which abrogates this marital status for fiscal purposes. The significance of this is that, while the spousal status subsists, the exempting provisions of paragraphs 73(1)(a) and (c) not only apply indefinitely but any inter vivos transactions of capital property between them do not have to meet any test by which an exemption would be available only where the matter is in settlement of rights arising out of marriage as is presently required to be met by former spouses within paragraph 73(1)(b).

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[230] As discussed supra at 47-48.

If the marriage is subsequently terminated by divorce, the parties would then be "former" spouses and any such property transactions between them would thereupon come within the exempting provisions of paragraph 73(1)(b), but only if its conditions were satisfied.

9. The Spouse as Survivor

A. The General Rule

Subsection 70(5) of the Income Tax Act is the general rule that governs the tax consequences on death which deems that the deceased, immediately before death, to have disposed of and to have received fair market value for all his capital property and to have received a median value for all his depreciable property of a prescribed class.

B. The Exempting Rules

Subsections 70(6) and 70(6.1) are the relevant exempting provisions, each of which are subject to proposed amendment pursuant to clauses 39(4) and 39(6) respectively in Bill C-139 tabled in the House of Commons on December 7, 1982, to be applicable after 1980.

Upon amendment subsection 70(6) would read (the underlined words indicating the proposed additions) as follows:

> 70(6). Where any property of a taxpayer who was

> resident in Canada immediately before his death ... has, on or after his death and as a consequence thereof or as a consequence of a disclaimer or renunciation by a person who was a beneficiary under the taxpayer's will or intestacy, has been transferred to
>
> (a) his spouse who was resident in Canada immediately before the taxpayer's death, or
>
> (b) a trust, created by the taxpayer's will, that was resident in Canada immediately after the time the property vested indefeasibly in the trust under which
>
> (i) his spouse is entitled to receive all of the income of the trust that arises before the spouse's death, and,
>
> (ii) no person except the spouse may, before the spouse's death, receive or otherwise obtain the use of any of the income or capital of the trust,
>
> if the property can, within 15 months after the death of the taxpayer or such longer period as is reasonable in the circumstances, be established to have become vested indefeasibly in the spouse or trust, as the case may be, not later than 15 months after the death of the taxpayer, the following rules apply ... .

Upon amendment by substitution subsection 70(6.1) would read as follows:

> 70(6.1) For the purposes of subsection (6) ... a trust shall be considered to be created by a taxpayer's will if the trust is created
>
> (a) under the terms of the taxpayer's will, or
>
> (b) by an order of a court in relation to the taxpayer's estate made pursuant to any law of a province providing for the relief or support of dependants.

The effect of these exempting provisions is that they are applicable to a transfer or distribution of property, which would otherwise be subject to the general rules of taxation, if the transaction occurs:

- on or after death,
- as a consequence of death
- as a consequence of a renunciation or disclaimer,
- only in favour of the deceased's spouse,
- only if the property can, within 15 months after the death ... or such longer period as is reasonable in the circumstances, be established to have become vested indefeasibly in the spouse or trust, as the case may be, not later than 15 months after the death ..., and
- the residency requirements are met.

If these conditions precedent are satisfied then the transaction is viewed as a non-taxable event or rollover similar to that which could have occurred inter vivos.

It should be noted that neither the current subsections 70(6) and 70(6.1) nor the proposed amendments make any provision for property transfers or distributions to the deceased's spouse as a consequence of a matrimonial property distribution order made under any provincial enactment in that respect. In four Canadian provinces the death of one of the spouses is a triggering event which entitles the surviving spouse to bring an application for proprietary entitlements as provided therein.[231] Alberta has no such provision but rather turns on whether there had been a marriage breakdown inter vivos and, if so, the surviving spouse may commence or continue an application thereunder.[232] No reported tax cases could be found in which the words "in consequence of death" have been interpreted in collation with property transfers or distributions made in favour of a surviving spouse pursuant to family property legislation where death is a triggering event.

In any event for fiscal purposes the exemptions within subsections 70(6) and 70(6.1), if strictly interpreted, would be available only to a surviving person who was the spouse of the deceased immediately before death; that is, a person who was a party to a subsisting marriage that had not been fully terminated by divorce or annulment.

If a deceased person had entered into a marriage that was void at the time of his or her death presumably the fiscal exemptions may be wholly inapplicable. As noted previously any interested person, and presumably this could also include the Minister of National Revenue, may impeach a void marriage notwithstanding the death of one of the parties. However the Minister would more likely take the more simplistic position by assessing the taxation consequences on the assumption that the deceased had left no spouse surviving, thus requiring the survivor to establish that he or she was a spouse within the meaning of the exempting provisions.[233]

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[231] See the Saskatchewan Matrimonial Property Act, supra n. 180, subsection 30(1); the Nova Scotia Matrimonial Property Act, supra n. 180, paragraph 12(1)(d); the Marital Property Act, 1980 (N.B.), c. M-1.1, subsection 4(1) and the Matrimonial Property Act, 1979 (Nfld.), c. 32 paragraph 19(1)(d).

[232] See the Alberta Matrimonial Property Act, subsections 11(1) and 11(2) collated with the applicable provisions within subsection 5(1) which is discussed infra at 122-123.

One notable circumstance pertains to a surviving spouse who had been judicially separated prior to the other dying intestate. Section 11 of the Alberta Domestic Relation Act[234] provides that:

> 11. If, after a judgment of judicial separation, a spouse dies intestate during the continuance of the separation, the property of the person so dying devolves as though that person had been predeceased by the survivor.

Therefore, even if the aforesaid amendments to subsections 70(6) and 70(6.1) of the Income Tax Act are proclaimed, and notwithstanding any disclaimer or renunciation by any beneficiary under intestacy, there would nonetheless not be any devolution of property by intestacy occurring to the surviving spouse under provincial law or "as a consequence of death" under taxation law in these circumstances.

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[233] That the Minister's assumptions on assessment are deemed to be correct until disproved see Johnston v. M.N.R. [1948] C.T.C. 195 (S.C.C.).

[234] R.S.A. 1980 c. D-37.

If the judicially separated spouse of the deceased does receive property from the intestate spouse's estate, and in order to attract the fiscal exemption provisions, it would have had to have been by way of an order for relief and support made and given under the Alberta Family Relief Act wherein "dependant" means the spouse of the deceased without any such prescribed impediment.[235]

An interesting provision found in Alberta's Intestate Succession Act[236] should also be noted. Section 15 therein reads as follows:

> 15. A surviving spouse who had left the intestate and was living in adultery at the time of the intestate's death shall take no part in the intestate's estate.

The question of interpreting the meaning of the words "had left" arose in the Registrar of Supreme Court v. Mullins and Murphy[237] under a similar provision in the Newfoundland Intestate Succession Act. Mahoney, J. was of the opinion that the word "left" meant a departure or separation amounting to desertion.[238]

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[235] R.S.A. 1980 c. F-2, paragraph 1(d)(i). That the circumstances surrounding the making of an Order and the time of vesting of the property in the spouse is of importance see W.E. Hillis Estate v. The Queen, supra n. 225.

[236] R.S.A. 1980 c. 1-9.

[237] (1982) 24 R.F.L. (2d) 171 (Nfld. S.C.T.D.).

C. The Voidable Marriage that has been Annulled

In the case of Re Bradley and Minister of Finance[239] the wife to a marriage that was voidable had obtained a judicial decree of annulment, the finality of which was statutorily subject to the expiration of the time limited for appeal. The husband died pending his appeal, leaving a will under which his wife was the sole beneficiary. The issue rose as to whether or not the survivor was the "wife" of the deceased at the time of his death so as to attract the preferred rate under the Succession Duty Act then in force in the province. It was held that the annulment decree

> ... was the order *in rem* changing the status and the appellant, by and at the time of the annulment decree, ceased to enjoy the status of 'wife' ... for the purposes of the Act.[240]

Therefore, subject to any legislative rules to the contrary, where a voidable marriage has been annulled by penultimate decree the surviving party would presumably not be a "spouse" for fiscal purposes on the death of the other.

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[238] *Id*. at 173.

[239] (1974) 46 D.L.R. (3d) 446 (B.C.C.A.).

[240] *Id*., per Carrothers, J.A. at 452.

However it should be noted that the result would not be the same in circumstances where a decree nisi of divorce had been granted as the survivor would retain the status of "spouse" on the death of the other.[241]

D. The Polygamous Marriage

That the surviving spouses to a polygamous marriage have each been held to be a wife for the British Columbia Succession Duty Act then in force, such claim not being a matrimonial cause, has been previously noted.[242]

In the recent English case of Re Sehota[243] the deceased had acquired two wives in a polygamous marriage, all parties subsequently acquired an English domicile of choice, the husband died and by will left all his estate to his second wife. The first wife succeeded in establishing her claim for provision out of the estate as the "wife" of the deceased. Foster, J. stated:

> There is no definition of 'the wife' in the Act and therefore it is a question of construction ... I do not think that the plaintiff is asking for matrimonial relief ... [h]er husband is dead and

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[241] As noted supra at 49.

[242] See Yew v. A.G. for British Columbia, supra at 90-91.

[243] [1978] 3 All E.R. 385.

> she seeks reasonable provision from his estate ... this is a question of the law of succession ... .[244]

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[244] Id. at 387-389. If it had been categorized as a claim for matrimonial relief, the meaning of "the wife" would have been construed in light of recent English legislation wherein matrimonial relief could be granted in the case of polygamous marriages, (see headnote).

PART IV THE ALBERTA MATRIMONIAL PROPERTY ACT

1. Introduction

This legislation provides no entitlements or remedies pertaining to maintenance and support but rather empowers the court to distribute property acquired by the parties during their marital relationship either equally or in a proportion or manner that is just and equitable having regard to the thirteen statutory factors enumerated therein.[245]

The Act is premised on the concept that the applicant spouse must then have, or have had, a marital status extant or previously extant, be it valid, voidable or void, the latter requiring the establishment by the applicant of good faith at its inception.[246] A further premise is that of *inter vivos* breakdown of the marital relationship to which time limitations are imposed in order to bring the action.[247]

That this Act is remedial in nature and scope is clear. On evidence of marital breakdown it empowers the court to effectually alter the common law doctrine of separate property based, inter alia, on recognition of non-monetary contributions by way of domestic or other unpaid labour rendered by the non-owning spouse during the relationship[248] to the acquisition and maintenance of property, all of which would not have been in itself sufficient to attract the proprietary entitlements or remedies available on the basis of the equitable trust doctrines.[249] Therefore the rights and benefits available under this enactment are of considerable importance to any individual seeking to come within its provisions and who must be a spouse or former spouse for its purposes.

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[245] Subsections 7(3) and (4) and section 8.

[246] Subsection 1(e) and section 2.

[247] See *infra* at 111.

2. Subsection 1(e)

As this subsection is to be analyzed it bears repeating:

> 1. In this Act,
>
> (e) 'spouse' includes a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable.

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[248] Subsection 8(a).

[249] As to an analysis of remedies based on the equitable doctrine based on the law of trusts see J.L. Dewar, "The Development of the Remedial Constructive Trust", (1982) 60 Can. Bar Rev. 265, N.M. Fera, "The Role of the Resulting Trust in Family Law", (1980) 11 F.L.R. (2d) 6 and A.J. McClean, "Constructive and Resulting Trusts Unjust Enrichment in a Common Law Relationship - Pettkus v. Becker", (1982) 16 U.B.C. L. Rev. 155.

It should be separated into two parts. The first part is that a spouse includes a former spouse and the second part is that spouse includes a party to a marriage notwithstanding that the marriage is void or voidable. The second part is clearly worded in the present tense[250] and therefore relates to a valid, voidable or void marriage that is currently extant and not yet terminated or annulled as the case may be.

If this subsection were to be interpreted in isolation from the rest of the Act the following would be the result. As to the second part reflecting the present tense, the word "spouse" would mean a man or a woman who are related to each other by a subsisting marriage that is valid in every respect, or is voidable at the instance of one of the parties during their joint lives, or is void at its inception, or is the subject of a decree of judicial separation or decree nisi of divorce. As to the first part, the words "former spouse" would mean a man or woman who had been related to each other by marriage to each other which had been terminated by a Canadian or a recognized foreign decree absolute of divorce.

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[250] That the present tense used in a statutory provision may have a decisive effect requiring consideration of only present conduct or an existing state of affairs; see Maxwell on the Interpretation of Statutes, supra n. 5 at 31.

The foregoing is illustrative of the exclusion, due to its attributable common law meaning, of a person who was a party to a void or voidable marriage that had been annulled from being within the meaning of the words "former spouse" and of a person who is a party to a cohabitation relationship without marriage from being within the word "spouse".

Accordingly the Act should be examined contextually to determine whether or not these meanings have been abrogated for its purposes.

3. The Context of the Act

A. Cohabitation

Unlike some of the other provinces, the Alberta legislation does not directly prescribe any requirement that the spouses be "married" to each other.[251] However a requirement of some form of marriage may be grammatically inferred through use of the inclusive words wherein spouse is prescribed to include a party to a "marriage".

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[251] For example, where the statutory definition of spouse is prescribed to mean a person or a man or a woman "married" to each other see the Saskatchewan Matrimonial Property Act, supra n. 180, subsection 2(k); the Nova Scotia Matrimonial Property Act, supra n. 180, subsection 2(g); the New Brunswick Marital Property Act, supra n. 231, section 1; the Newfoundland Matrimonial Property Act, supra n. 231, paragraph 2(1)(e); the Marital Property Act, 1978 (Man.), c. 24, subsection 1(g) and the Ontario Family Law Reform Act, supra n. 134, subsection 1(f). The Family Relations Act, R.S.B.C. 1979, c. 121, subsection 1 prescribes that a spouse means a wife or husband.

The word "marriage" is not defined for the purposes of the Act and is used frequently and consistently throughout.[252] The only inference therein that could in any way relate to cohabitation is found in subsection 37(2)whereby any property agreement made in contemplation of marriage would not be enforceable until after the marriage.

Accordingly it is submitted that, as the common law meaning of spouse can not be seen as having been abrogated in clear and unambiguous words or by necessary implication from the language used, a person who is a party to a cohabitation relationship that lacks the element of marriage would not come within the meaning of spouse for purposes of the Alberta legislation.

B. The "Former Spouse" to an Annulled Marriage

That the Act effectively abrogates the common law meaning of "former spouse" for its purposes to include a party to a void or voidable marriage that had been annulled is identified within the following provisions. Paragraph 5(1)(a)(ii) states that a matrimonial property order may be made if a declaration of nullity of the marriage had been made. Paragraphs 6(1)(a) and 6(1)(b) provide that an application for a matrimonial property order to which section 5(1)(a) applies may be commenced at or after the date the proceedings are commenced for a declaration of nullity but may be commenced not later than 2 years after the date of the declaration.

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[252] For example, see paragraphs 3(1)(c), 5(1)(a), 7(2)(c), 7(2)(f), 7(3)(b), and 7(3)(c) and subsections 7(4), 8(a), 8(d), 8(e), 37(2), 37(3)(a) and 37(4).

The "declaration of nullity" referred to in these provisions presumably includes both a declaration of nullity of a void marriage and a decree nisi of annulment of a voidable marriage since both void and voidable marriages are statutorily included within the meaning of "spouse" in subsection 1(e).

4. Section 2 and the Void Marriage

That the abrogation of the common law meaning of spouse to include a party to a marriage that is void is statutorily restricted is clearly evidenced in section 2 of the Act which states that:

> 2. Nothing in the Act confers a right on a spouse who at the time of marriage knew or had reason to believe that the marriage was void.

It should be additionally noted in Part 3 of the Act, in which the general provisions are found, subsection 37(1) provides that:

> 37(1) Part I does not apply to property that is

> owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.

but that by subsection 37(4):

> 37(4) An agreement under subsection (1) is unenforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

The effect of these provisions is that none of the rights given under this Act, that is the right to obtain any matrimonial property distribution order or the right to enforce any matrimonial property agreement, are available to the party who had contracted a void marriage other than in good faith. Such a party would thereby be excluded from the extended meaning of spouse or former spouse, as the case may be, for its purposes.

Presumably any proprietary remedies that may otherwise be available to the non-innocent spouse of a void marriage would be determined in accordance with common law principles arising out of the law of contract if the parties had entered into any proprietary agreement,[253] or the equitable trust doctrines if there had not been any agreement,[254] but all of which, even if exercised in conjunction with a matrimonial cause,[255] would not be founded upon, and thereby not be characterized as, an entitlement or right arising out of marriage.

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[253] See C. Davies, supra n. 51 at 57-58.

[254] See supra n. 249.

5. The Time Limitations

The time limitations are found within Part I of the Act. They are that an application may be brought within two years after the date the parties separated,[256] or at or after the date proceedings are commenced for a decree of divorce, a declaration of nullity or judgment of judicial separation,[257] or not later than two years after the date of granting of a decree *nisi* of divorce, declaration of nullity or judgment of judicial separation.[258]

Correspondingly, the Act provides that a matrimonial property order may only be made where the Court is satisfied that the parties have been living separate and apart,[259] or if a decree *nisi* of divorce has been granted, or a declaration of nullity has been made or a judgment of judicial separation has been granted.[260]

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[255] See the Alberta Domestic Relations Act, *supra* n. 234, section 23.

[256] Subsection 6(2).

[257] Paragraph 6(1)(a).

[258] Paragraph 6(1)(b).

[259] In accordance with the time period or judicial satisfaction as provided in paragraph 5(1)(c).

Accordingly the right to bring the action, and therefore to obtain any matrimonial property distribution thereunder based particularly on the marital and domestic contribution factors that may be seen as arising out of and by virtue of the marriage, is fully dependent on the time limitation being satisfied.[261]

However Part I of the Act, and therefore the time limitations contained therein, may not pertain where the parties have entered into an enforceable and subsisting written agreement in accordance with subsection 37(1) of the Act that provides for the status, ownership and division of property that is then owned or subsequently acquired by either or both spouses. Subsection 37(3) states that the agreement may provide for the distribution of property between the spouses at any time.[262]

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[260] Paragraphs 5(1)(a) and (b).

[261] That a statutory time limitation may be an essential part of the definition of spouse see Fromovitz v. Fromovitz (No. 2) (1980) 11 R.F.L. (2d) 376 (Ont. S.C.F.L.D.).

[262] Subsection 37(3) states that an agreement under subsection (1):

> (a) may provide for the distribution of property between the spouses at any time including, but not limited to, the time of separation of the spouses or the dissolution of the marriage, and
>
> (b) may apply to property owned by both spouses and by each of them at or after the time the

Notwithstanding the above it should be noted that the time limitations in Part I of the Act may still pertain if a section 37(1) agreement is found to be unenforceable by virtue of non-compliance with the statutory requirements of paragraph 38(1(d) in which such an agreement is enforceable if each spouse has acknowledged in writing that he or she is aware of the nature and effect of the agreement and particularly:

> 38(1)(d) that he is aware of the possible future claims to property he may have under this Act and that he intends to give up these claims to the extent necessary to give effect to the agreement.

It is difficult to envisage any such future claims that may be had under the Act if the time limitation had then already expired.

6. The Polygamous Marriage

Whether or not the Alberta matrimonial property legislation could be said to wholly exclude a spouse to a polygamous marriage would necessarily depend on whether or not an application thereunder would be characterized as one for matrimonial relief in a matrimonial cause.

As noted earlier, the Ontario and Yukon family property

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[262] (cont'd)agreement is made.

legislation[263] purports to confer such rights by specifically providing that their Act applies to persons whose marriage was actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognized the marriage as valid.

The Alberta legislation is silent in this regard. However subsection 17(1) therein should be noted as it provides that:

> 17(1) If a question respecting property arises between spouses in any other matrimonial cause the Court may decide the question as if it had been raised in proceedings under this Part.
>
> (the underlining is mine)

It is submitted that the answer does not necessarily lie here for two reasons. Firstly, this section appears to deal with procedural rather than substantive issues. Secondly, the meaning of the phrase "property...in any other matrimonial cause" is unclear and ambiguous as any matrimonial cause is unlikely to involve a question of property between the spouses, save and except perhaps those matters arising under the Alberta Domestic Relations Act.[264] That the majority of the provisions of the Alberta Domestic Relations Act do deal with applications for matrimonial relief in a matrimonial cause is clear[265] and therefore the rights and proprietary entitlements or remedies thereunder would not be available to the spouses of a polygamous marriage, thereby precluding the necessity of subsection 17(1) of the Matrimonial Property Act arising in their case.

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[263] See supra n. 134 and n. 135 respectively.

[264] R.S.A. 1980 c. D-37. See particularly sections 21 and 23.

Additionally it is further notable that no preclusion to the right to commence an application for a matrimonial property order by a spouse to a polygamous or potentially polygamous marriage may be found within the residency requirements of paragraphs 3(1)(a) or 3(1)(b),[266] nor the timing provisions of subsection 6(2)[267] nor the conditions precedent to the making of an order under paragraph 5(1)(c).[268]

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[265] Id. Part 1 of the Act empowers the court to give a judgment for restitution of conjugal rights; Part 2 empowers the Court to grant a judgment of judicial separation and under Part 3 alimony and maintenance may be ordered under certain circumstances.

[266] 3(1). A spouse may apply to the Court for a matrimonial property order only if

> (a) the habitual residence of both spouses is in Alberta, whether or not the spouses are living together,
>
> (b) the last joint habitual residence of the spouses was in Alberta, or ... .

[267] 6(2). An application for a matrimonial property order to which section 5(1)(c) ... applies may be commenced within 2 years after the date the spouses separated.

[268] 5(1). A matrimonial property order may only be made

> (c) if the Court is satisfied that the spouses

Clearly the Act does not require termination of a marriage as a condition or requirement of its applicability; it is premised simply on marital breakdown as evidenced, inter alia, by the spouses living separate and apart for one year or less if the Court is satisfied there is no possibility of a reconciliation.[269]

It is also submitted that it is difficult to justify the preclusion of the rights and benefits given under this legislation solely on the basis that these parties have no remedies in Canada that would validly terminate their married status or declare it to be void.

The rule in Hyde v. Hyde and Woodmansee[270] merely declined matrimonial relief in refusing to grant a decree of divorce on the basis that the then matrimonial laws of

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[268](cont'd)have been living separate and apart

> (i) for a continuous period of at least one year immediately prior to the commencement of an application, or
>
> (ii) for a period of less than one year immediately prior to the commencement of an application if, in the opinion of the Court, there is no possibility of the reconciliation of the spouses.

[269] Id. paragraph 5(1)(c).

[270] Cited and discussed supra at 19-20.

England were adapted to the Christian marriage (i.e. one that is monogamous), were wholly inapplicable to polygamy and that, as between the marital parties, they were not thereby entitled to the remedies, adjudication or relief of the matrimonial laws of England. The effect of this rule is that Canadian courts are still without jurisdiction to grant a divorce, a decree of judicial separation or of restitution of conjugal rights or to grant maintenance or alimony to the parties of such a union, as these are matters that arise specifically and directly out of the incidents of marriage. The Alberta Matrimonial Property Act does not deal with any of these matters.

In Baindail v.Baindail[271] Lord Green, M.R., in discussing the decision of Hyde v. Hyde and Woodmansee stated:

> Lord Penzance quite clearly saw how undesirable it would be to attempt to lay down any comprehensive rules as to the manner in which polygamous marriage ought to be regarded by the courts of this country for purposes different from that with which he was immediately concerned.[272]

In Re Sehota[273] the deceased and his two wives had acquired an English domicile of choice and by his will he left the whole of his residuary estate to his second wife. The first wife claimed for a share in the estate as a "wife" of the deceased under English family and dependants' legislation. This was opposed by the second wife on the basis that the claim was for matrimonial relief and that under English law a party to a polygamous marriage was therefore disentitled to make such a claim. It was held that the claim was not for matrimonial relief but a question of the law of succession to which the rule in Hyde v. Hyde and Woodmansee was not applicable.

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[271] [1946] 1 All E.R. 342.

[272] Id. at 345.

[273] Cited supra n. 243.

In Din v. National Assistance Board[274] the issue arose as to whether the wife of a polygamous marriage was a "wife" within the National Assistance Act then in force. Salmon, L.J. stated:

> When a question arises, of recognizing a foreign marriage or of construing the word 'wife' in a statute, everything in my view depends on the purpose for which the marriage is to be construed and the objects of the statute. I ask myself first of all: is there a good reason why the appellant's wife and children should not be recognized as his wife and children for the purpose of the National Assistance Act, 1948? I can find no such reason, and every reason in common sense and justice why they should be so recognized.[275]

No reported cases could be found involving a polygamous union wherein statutory dower rights given to a spouse of a married person or equitable remedies based on the law of trusts were denied for that reason. With respect to the latter, it is notable that the Supreme Court of Canada in Pettkus v. Becker[276] applied proprietary equitable trust doctrines in favour of a party who had lived with another in an unmarried marital relationship of lengthy duration.

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[274] [1967] 1 All E.R. 750.

[275] Id. at 753.

The Alberta Matrimonial Property Act does not define "marriage" for its purposes nor does it preclude the situation of a plurality of spouses making application thereunder at the same time against the same person, as one claimant may be the innocent spouse of a void marriage, one may be the spouse to the valid marriage, and one may be the former spouse.

Section 10 of the Alberta Interpretation Act[277] provides as follows:

> 10. An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects

and subsection 24(3) prescribes:

> 24(3). In an enactment, words in the singular include the plural, and words in the plural include the singular.

The judicial comments in the case of Yew v. A.G. for

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[276] (1981) 117 D.L.R. (3d) 257 at 275-276.

[277] R.S.A. 1980, c. I-7.

British Columbia bear repeating.[278] Macdonald, C.J.A. stated:

> It was argued that the Legislature must be presumed to have had in mind a wife by a Christian marriage only, but the true presumption is that the Legislature knew the state of the law and legislated in light of it.

Martin, J.A. observed that the Act in question itself presented no obstacle to the claim of the two wives to a polygamous marriage and was of the opinion that:

> [E]ither polygamous marriages are void ab initio or they are likewise valid ... .

If the opinion of Martin, J.A. is correct, and assuming that the Alberta Matrimonial Property Act is characterized as one of relief in a matrimonial cause, then perhaps the parties to a polygamous marriage may, by virtue of the extended meaning of spouse prescribed thereunder, be viewed as a party to a marriage that is void for its purposes; the question of good faith then not being in issue as the parties would have presumably believed they were in fact contracting a valid marriage at the time and for all purposes.

Given the absence of Alberta statutory provision similar to that of Ontario and the Yukon, there is uncertainty in this area which would have to be resolved by judicial pronouncement as to whether or not the object and purpose of the Alberta Matrimonial Property Act may be characterized as being, or not being, in the nature of a matrimonial cause.

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[278] See supra at 90-91.

7. The Spouse as Survivor

A. Introduction

At the outset it should be noted that the rights conferred by Part I of the Act in favour of a spouse are personal only and do not survive the death of that person.[279] Section 16 reads as follows:

> 16. Notwithstanding The Survivial of Actions Act, the rights conferred on a person by this Part do not survive the death of that person for the benefit of his estate.

As section 16 is found in Part I of the Act it is applicable to those rights that are conferred by that Part, and therefore any proprietary rights that arise pursuant to a section 37 written property agreement that had been made between the spouses *inter vivos* would not be affected as a section 37 agreement falls under Part 3 of the Act.

While the inclusive meaning statutorily attributed to the word "spouse" in subsection 1(e) makes no mention of a surviving spouse,[280] widow or widower,[281] subsections 11(1) and 11(2) extend the rights and remedies of the Act in favour of a surviving spouse where an application for a matrimonial property order is continued or where it could have been commenced immediately before the death of the other spouse;[282] and provided that it is brought within six months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.[283]

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[279] cf. Barker v. Westerminster Trust Co., [1941] 3 W.W.R. 473 (B.C.C.A.)

Therefore all of the limitations and conditions applicable to the parties while they are both alive are equally applicable to a surviving spouse or surviving former spouse, save and except for the additional time limitation of 6 months just mentioned.

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[280] For example, see paragraph 2(k)(iii) of the Saskatchewan Matrimonial Property Act, supra n. 180 which prescribes that "spouse" includes a surviving spouse.

[281] For example see subsection 2(g) of the Nova Scotia Matrimonial Property Act, supra n. 180 and subsection 2(e) of the Newfoundland Matrimonial Property Act, supra n. 231.

[282] Note that the right to commence the action would still be subject to the jurisdictional requirements of sections 2, 3, 5 and 6 of the Act.

[283] See subsection 11(4) of the Act. Part I of the Ontario Family Law Reform Act, supra n. 134 has been judicially interpreted to apply to questions between spouses or former spouses only if both are living at the commencement of the proceedings; Kiss v. Palachik (1981) 34 O.R. (2d) 484 (C.A.) at 487. See also Nevile v. Beckstead (1980) 11 R.F.L. (2d) 190 (Ont. Co. Ct.) and editorial annotation therein by Professor James G. McLeod, id. at 190. For case commentary see Rodney Hull, "Is a Deceased Spouse a Former Spouse under Sections 7 and 8 of the Family Law Reform Act?", (1980) 13 R.F.L. (2d) 174. For a recent commentary see A. Bissett-Johnson, "Death and the Matrimonial Property Act", (1982) 25 R.F.L. (2d) 182.

B. The Surviving Spouse

By combining the inclusive extended meaning of "spouse" as found within subsection 1(e) with the term "surviving" as used in section 11, for the purposes of the Act the meaning of spouse would thereby presumably include:

(a) the survivor of a marriage that was valid in every respect and subsisting prior to the death of the other;

(b) in confirmation of the common law meaning, the survivor of a subsisting marriage that would have been voidable at the instance of one of the parties during their joint lives; and

(c) in abrogation of the common law meaning, the survivor of a marriage that was void[284] prior to the death of the other but which had not been the subject of a declaration of nullity.

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[284] The statutory impediment in section 2 of bad faith would still apply.

It is thereby obvious that the statutory meaning attributable to "surviving spouse" contemplates some form of marital status, be it de jure or de facto that was subsisting immediately before the death of the other party.

C. The Surviving Former Spouse

As noted earlier, the Act has specifically abrogated the common law meaning of "former spouse" which would have otherwise excluded a party to a voidable marriage that had been annulled during their joint lives and a party to a void marriage that had been judicially declared to be a nullity at its inception.

D. The Deceased's Estate

Where an individual dies prior to any matrimonial property order having been made divesting him or her of an interest in property, section 12 allows the Court to suspend all or part of the administration of the estate pending the determination of an application for an order under the Act. Once a determination has been made, section 15 provides as follows:

> 15. Money paid to a living spouse or property transferred to a living spouse under a matrimonial property order shall be deemed never to have been part of the estate of the deceased spouse with respect to a claim against the estate
>
> (a) by a beneficiary under a will,
>
> (b) by a beneficiary under The Intestate

Succession Act, or

(c) by a dependant under The Family Relief Act.

In this respect it is notable that these limitations do not include creditors of the estate and therefore any fiscal matters would be determinable under the applicable provisions of the Income Tax Act then in force.

PART V SUMMARY AND CONCLUSIONS

In summary, recent developments in law reform expressed through vehicles of legislative enactments together with a more liberalized attitude of the courts have all served to modify and abrogate the common law meaning ordinarily attributed to otherwise ambiguous statutory terminology involving terms such as "spouse" or "former spouse".

However the very basic and obvious indicator which compels a cautious analytical approach is that the Alberta Matrimonial Property Act purports to prescribe a consistency to the meaning of these words for the purposes of the Act throughout, while the Income Tax Act currently confines it to the specific or stated exempting provisions of section 73. In this respect it should be noted that the extended meaning is not attributable to the previously mentioned joint liability for tax provisions of section 160, nor to the attribution provisions of section 74, nor to the tax free rollover rules applicable to the devolution of property on death under the provisions of subsections 70(6) and 70(6.1).

Further, any intended policy objectives of these two very different pieces of legislation of concern to spouses and former spouses which should be integrated may, in the result, prove to be otherwise. Examples of the lack of integration, or uncertainty of integration, of some of the implications of the Income Tax Act with those of the Alberta Matrimonial Property Act are notable.

Under the Alberta Matrimonial Property Act a former spouse must bring their application for a matrimonial property order no later than two years from the date of a decree nisi of divorce, a declaration of nullity of marriage or judgment of judicial separation. Whether this statutory limitation operates to either substantively extinguish all the rights given under the Act or merely to procedurally bar an application to seek such rights has not been judicially determined.

Subsection 73(1) of the Income Tax Act has no overt time constraints, and a transfer of capital property falling under paragraph 73(1)(a) may be made to a spouse at any time and for any reason. Judicially separated parties are still married and each retains the spousal status until the marriage is terminated by divorce. Therefore a spouse that has been judicially separated for longer than two years technically satisfies the provisions of paragraph 73(1)(a) notwithstanding that their rights may have been barred, either substantively or procedurally, under the Alberta Matrimonial Property Act. Any capital property settlement agreement effected between these spouses, which may be motivated by moral considerations, mistake or forbearance of litigation, would not offend the tax free rollover provisions of the Income Tax Act.

However, under paragraph 73(1)(b) of the Income Tax Act a transfer of capital property may be made on a tax free basis to a former spouse but only if it is "in settlement of rights arising out of marriage". The meaning of this phrase has not been defined either in the Act nor judicially to date, but its interpretation may be influenced by the provisions of subsection 73(1.1) which clearly contemplates a court ordered entitlement to property rights.[285] It is uncertain as to whether this phrase would be narrowly interpreted to include only those "rights" available under the provisions of the Alberta Matrimonial Property Act that could have been recognized and satisfied by an award of the court, although it does not say that.[286] In the case of former spouses who are beyond the two year limit, such rights may be viewed as having been substantively rather than procedurally extinguished for all purposes. If it is found to be the former, and if that fiscal phrase is interpreted to mean such rights as could only have been available under provincial law, then any capital property transfers arising out of a settlement agreement may not come within the tax free rollover provisions of paragraph 73(1)(b) of the Income Tax Act. The result would thereby effectually impose an integrated time limitation with that of the Alberta Matrimonial Property Act, but only as against a person who is a former spouse.

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[285] Subsection 73(1.1) was not intended as a provision by which it is sought to define or interpret any such rights but rather is a provision expressed as for greater certainy in deeming a transfer of property to have occurred for the rollover purposes of subsection 73(1).

[286] It is the observation of one commentator that generally no rights arise out of matrimonial property legislation until an order has been obtained, although it is noted that in British Columbia a tenancy in common in matrimonial property is automatically created on marriage breakdown; see A.J. McClean, "Matrimonial Property-Canadian Common Law Style", (1981) 31 U.T.L.J. 363. Note also section 2 of the Alberta Matrimonial Property Act which denies the conferring of any 'right' under the legislation to a spouse who contracted a void marriage otherwise than in good faith.

Thus a spouse who has been judicially separated for longer than two years may nevertheless obtain their remedies through property settlement agreement without concern as to any immediate taxation consequences but a former spouse in similar circumstances is at risk.

A similar advantage exists in favour of those spouses to a void marriage where one or both entered into their married with the knowledge that it would be void at inception. Any capital property settlement may be free of immediate tax consequences under paragraph 73(1)(a) of the Income Tax Act if made prior to annulment, but would have to satisfy the test of paragraph 73(1)(b) aforesaid if made as former spouses after annulment, as the impediment may be section 2 of the Alberta Matrimonial Property Act if it is categorized as substantive. The result is that paragraph 73(1)(b) of the Income Tax Act and section 2 of the Alberta enactment may be integrated, to the detriment of former spouses, but would presumably be non-integrated to the comparative advantage of those persons in these circumstances who are still spouses.

An even greater anomaly may arise concerning former spouses of a polygamous marriage that had been recognized as validly terminated otherwise than by annulment. If the rights given under the Alberta Matrimonial Property Act are categorized as other than a matrimonial cause, and a matrimonial property order is made, or the parties enter into a property settlement, there may be considerable uncertainty as to its effective integration with the limiting provision of paragraph 73(1)(b) of the Income Tax Act that it be in settlement of rights arising out of marriage. Under these circumstances this phrase assumes the spectre of an implied requirement of a matrimonial cause for taxation purposes even though this may not have been a requirement for Alberta matrimonial property law purposes.

While all of the above circumstances underscore either a lack of or uncertain integrative effects arising out of the workings of the Alberta Matrimonial Property Act with that of the provisions of the Income Tax Act, such does not occur directly out of the extended meanings attributed to the terms "spouse" or "former spouse" by both enactments. Therefore, save and except the inherent difficulties pertaining to polygamous marriages, both enactments _prima facie_ exclude and include the same relationships.

In conclusion, it is submitted that there is integration of the meanings of these words which is illustrative of effectual fiscal neutrality in this area, but only as it is of application to matrimonial property orders or settlements made while the spouses or former spouses concerned are both alive.

One integrative omission of concern that requires consideration and reform pertains to the apparent fact that the ordinary taxation rules apply on the death of a taxpayer notwithstanding a matrimonial property order being made in favour of a spouse or former spouse subsequent to the death. Currently the Income Tax Act deems the deceased to have disposed of all of his or her property immediately before death, with ensuing tax consequences. On the making of a matrimonial property order the Alberta Matrimonial Property Act deems that the property which was the subject of the Order never to have been part of the deceased's estate. Any reform in this area, with the view to achieving integration of effect, should also necessarily include integration of the extended meanings assigned to those spouses or former spouses who would be intended to be the recipients of its benefits.

A final notable omission of concern requiring fiscal reform pertains to alleviating an inequity that exists in the joint and several liability for tax provisions in section 160 of the Income Tax Act. As noted earlier, the extended meaning of spouse and former spouse is not expressed to be applicable to these provisions and consideration should therefore be given to doing so in order to ensure equal treatment of spouses regardless of whether they are or had been a party to a valid or void marriage.

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C.R.	Report of the Proceedings of the Annual Conference of the Canadian Tax Foundation
C.T.J.	Canadian Tax Journal
T.P.	Canadian Tax Papers

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